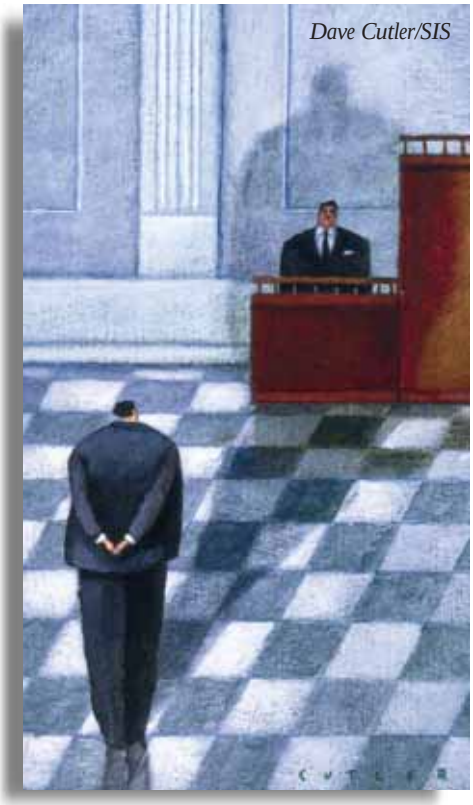
The Confrontation Clause Radically Redefined by *Crawford v. Washington*

BY ROBERT P. MOSTELLER

Lawyers know that when statements made outside of court are offered in evidence the hearsay rule must be overcome. In criminal cases, the Confrontation Clause of the Sixth Amendment poses an additional issue when evidence is offered against the criminal defendant. In *Crawford v. Washington*,[1] the United States Supreme Court radically changed Confrontation Clause doctrine, which had become relatively settled and in most situations, relatively easy to overcome. In *Crawford*, the Court created a very firm rule of exclusion for "testimonial" statements with quite limited exceptions.



Dave Cutler/SIS

I. The Facts of *Crawford v. Washington*

Michael Crawford was tried for assault and attempted murder for stabbing a man whom he contended had attempted to rape his wife, Sylvia. The police arrested him for the stabbing, and after giving both Michael and his wife, Sylvia, *Miranda* warnings, they interrogated both husband and wife twice. The statement Michael challenged under the Confrontation Clause came from a tape-recorded interrogation of Sylvia. In her second interrogation, she gave a version of the fight between Michael and the alleged victim that at least appeared inconsistent with her husband's self-defense claim.

Sylvia's tape-recorded statement was introduced at trial against Michael "even though he had no opportunity for cross-examination."[2] In reviewing the statement's admission by the trial court, the Washington Court of Appeals and Washington Supreme Court applied

slightly different tests grounded in the framework described by *Ohio v. Roberts*,[3] a system that looks for "adequate 'indicia of reliability.'"[4] However, the two courts reached opposite results. The court of appeals reversed the conviction, finding no "particularized guarantees of trustworthiness," while the Washington Supreme Court reinstated the conviction because "it bore guarantees of trustworthiness."[5]

The United States Supreme Court granted *certiorari*. It held that admission of the statement violated the Confrontation Clause, which it recognized it could have done under *Roberts*.[6] However, the Court developed a dramatically different theory for the reversal, which breathed new life into the Confrontation Clause, disrupted well established prosecution practices, and created a raft of unanswered questions.

II. General Theory under the New View of the Confrontation Clause

Justice Scalia, writing the opinion for seven members of the Supreme Court, concluded on the basis of history and references to the dictionary that the "principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[7] This civil law procedure, with its roots on the European continent, of private examination by judicial officers stood in sharp contrast to the preferred English common law tradition of "live testimony in court subject to adversarial testing."[8]

The Court then examined the text of the Confrontation Clause in the Sixth Amendment, which provides that in criminal prosecutions, "the accused shall enjoy the right . . . *to be confronted with the witnesses against him*" (emphasis added). The Court derived from that terminology a focus on "testimonial" statements. "'Witnesses' against the accused" indicated in the Court's judgment that the clause was to be applied to "those who 'bear testimony.'"[9]

> "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." . . . An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.[10]

The Court left "for another day" an effort to comprehensively define what are "testimonial" statements. However, "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."[11]

For "testimonial" statements, the Court erected a bold "STOP SIGN" in the absence of cross-examination, rejecting the reliability/trustworthiness analysis of *Roberts*:

> Where "testimonial" statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.
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> . . . .
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> Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.[12]

III. What are "Testimonial" Statements?

No Clear Definition but Several Possible Definitions

While deferring adoption of a comprehensive definition for "testimonial" statements, the Court noted some possible formulations of the "core class of 'testimonial' statements."[13] It set out three possible definitions:

- *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarant would reasonably expect to be used prosecutorially;[14]
- extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;[15]
- statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.[16]

These potential definitions differ on several dimensions. One is whether the statement must be a formal statement, as suggested in the second and narrowest definition. The final definition, which is the most general, abstract, and malleable, provides the opportunity for the broadest application. Because the Court did not pick among these contenders, let alone adopt a comprehensive definition of "testimonial," there are many unanswered questions about the scope of coverage of *Crawford* and its "STOP SIGN" in the path of admission of "testimonial" statements. These questions, which are of critical importance, simply cannot be answered clearly at the present time because the concept has no established precedent in existing law.

Examples of "Testimonial" and Non-"Testimonial" Statements

Although not adopting a comprehensive definition, the Court did give a few specific examples of statements that *are* "testimonial." These include:

- "prior testimony at a preliminary hearing, before a grand jury, or at a former trial" and
- "police interrogations."[17]
- "plea allocution showing existence of a conspiracy,"[18] and presumably plea allocutions generally used to incriminate another.

The Court gave the following example of statements that *are not* "testimonial":

> "An off-hand, overheard remark," which it suggested might be a good candidate for exclusion under the hearsay rule, bears little resemblance to the abuses that were the target of the Confrontation Clause.[19] It also contrasted, "[a]n accuser who makes a formal statement to government officers," which is clearly "testimonial," with "a person who makes a casual remark to an acquaintance," which is not.[20]

Although hearsay exceptions do not match up with the concept of "testimonial" statements, the Court indicated that most, if not all, statements in two hearsay exceptions were

not testimonial. It stated that business records and statements in furtherance of a conspiracy are "by their nature . . . not testimonial."[21] On the other hand, the Court took a different view of excited utterances (also known as spontaneous declarations). It stated that its decision in *White v. Illinois*[22] was arguably incorrect in that it involved a statement of a child victim to an investigating police officer admitted as a "spontaneous declaration." The Court implied that the child's statement might have been "testimonial" and doubted it would have been admissible at the time the Sixth Amendment was adopted because "to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made 'immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.'"[23] The child's statement was made 45 minutes after the alleged assault.[24]

IV. Exceptions

The Court set out a limited number of exceptions where "testimonial" statements may be received. Given the clear "STOP SIGN," *Crawford* places in the way of admitting "testimonial" statements and the absence of any balancing test or relatively forgiving search for reliability/trustworthiness as existed under *Roberts*, great pressure will be exerted either to exclude statements from the definition or to fit them within an exception. The Court noted four exceptions and suggested there might be a fifth.

First, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."[25] This constituted a separate route for satisfying confrontation before *Crawford*, and it continues to work even if the statement is considered "testimonial." The most important cases here are *California v. Green*,[26] and *United States v. Owens*.[27] *Owens* is particularly expansive in ruling that very little more is required than that the prosecutor call the witness and that the witness "respond[] willingly to questions" in some form.[28] Neither failures in memory, real or contrived, nor inadequate responses short of a blanket refusal to answer questions will render the opportunity to cross-examine insufficient. Almost the only barriers to cross-examination that are constitutionally significant are (a) the successful invocation by the witness of an evidentiary privilege or (b) excessive and improper judicial interference with such cross-examination.[29] Thus, as far as the United States Supreme Court is concerned, the Confrontation Clause gives total freedom to the states and Congress to admit hearsay in whatever form they wish if the prosecution calls the declarant to the stand and that person submits willingly to questioning.

The second exception recognized by *Crawford* is a well-established method of satisfying the Confrontation Clause that the Court explicitly carried forward apparently without change. The confrontation right may be satisfied through a prior opportunity for cross-examination rather than through cross-examination at the current trial.[30] However, the unavailability of the declarant, under a constitutionally defined standard,[31] is specifically required, even if there has been prior cross-examination by the defendant.[32]

Third, the Court recognized that its concept of "forfeiture by wrongdoing" is consistent with the new approach.[33] Under that concept (which now in perhaps a slightly different form also constitutes a hearsay exception under the Federal Rule of Evidence 804(b)(6)), the accused is held to have forfeited his or her confrontation right by, for example, killing a witness for the purpose of preventing that person's testimony at trial. While the concept of "forfeiture by wrongdoing" as a *constitutional* principle applicable to confrontation issues is not new, it has not been fully defined. Given that "testimonial" statements will now often be excluded ("STOP SIGN"), how narrowly or broadly this concept will be treated is of increased importance, and it will no doubt be given greater attention.[34]

Fourth, *Crawford* does not bar the admission of out-of-court "testimonial" statements where they are used for a purpose "other than establishing the truth of the matter asserted"—where they are not used for a hearsay purpose.[35] The Court cited its decision in *Tennessee v. Street*[36] as an example. In *Street*, a confession made by another participant in the crime was introduced by the prosecution, not to prove its contents, but to rebut the defendant's claim that his statement was made in response to having that accomplice's statement read to him by the sheriff and further claimed that he was directed to say "the same thing."[37] The sheriff denied both allegations. In this context, the Court reasoned that the written statement of the other participant was useful for a purpose other than its truth—here, to aid the jury's evaluation of the plausibility of the defendant's claims and the sheriff's denial.[38]

Fifth, the Court recognized that dying declarations, even dying declarations that are clearly "testimonial" under its definition, might be admissible on historical grounds. At the time the Constitution was adopted, the established practice appeared to admit such statements as an exception to the common law principle of confrontation, which under the Court's analysis might mean it should stand as an exception to confrontation today as well. However, the Supreme Court stated that this exception, if it exists, is a very limited one: "If this exception must be accepted on historical grounds, it is *sui generis*."[39]

V. Important Unanswered Questions

A number of critical issues must be resolved, ultimately by the United States Supreme Court, but immediately by the lower state and federal courts. I will examine the general dimensions of several of these.

How Broadly or Narrowly is Police Questioning Included?

Perhaps the most obvious unsettled question is what type of statements to the police are covered by *Crawford's* analysis? The Supreme Court did not tell us whether the circumstances in that case defined the outer boundaries of when police questioning/ interrogation was covered by the new analysis or whether that case was at the core of a broader range of statements to the police that were covered. It did not need to refine its definition of such interrogations because it concluded that what occurred in *Crawford* "qualifie[d] under any conceivable definition."[40] These were "recorded statements, knowingly given in response to structured police questioning."[41]

Several lower court cases have taken quite a narrow view of the type of police questioning that is covered, limiting *Crawford's* analysis to statements obtained under circumstances closely similar to the interrogation of Sylvia Crawford. One of the most extreme is *People v. Cage*,[42] where the California Court of Appeals found that highly accusatory statements made by an assault victim to the police when interviewed in the hospital emergency room were not "testimonial." The test used by the court was one of analogy: did this conversation closely resemble the type of formal inquisitorial proceedings that occurred before examining magistrates who interrogated suspects and witnesses brought before them in hearings under English statutes enacted at the time of Queen Mary to determine bail and commitment? Since the statement in *Cage* did not, it was

treated as non-"testimonial and admitted in the absence of confrontation."[43] Similarly, an intermediate appellate court in Indiana drew a distinction between police questioning, which was not covered, and interrogation, which *Crawford* had clearly covered.[44] Two panels of the court of appeals in Texas took completely different views of such police questioning, one treating it as non-"testimonial," and the other explicitly disagreeing.[45]

A panel of the North Carolina Court of Appeals took what might be seen as even a more extreme view. After the defendant had been forcibly subdued in a public police standoff/kidnapping, it treated statements by the victim to a police officer as non-"testimonial" because they began spontaneously.[46] Apparently by contrast, another panel of the North Carolina Court of Appeals found statements to police early in the investigation "testimonial,"[47] and courts in other jurisdictions have found generally that statements during field investigations are similarly "testimonial."[48]

One could state an opinion as to how this conflict should be resolved, and my personal view of part of that resolution is that accusatory statements knowlingly made to the police should be treated as "testimonial." Whether formally recorded or not, they are effectively "on the record," and unless barred by some rule of evidence, they are destined for admission in court if helpful to the prosecution.[49] However, the resolution of this issue must come from the United States Supreme Court.

Are Only Statements to Governmental Officials/Investigative Agents Covered?

Another question is whether the government must have a role in creating the statement. The conflict among the lower courts is undeniable here as well. An appellate court in Michigan ruled that a statement made to a private individual working for an agency that deals with child abuse, rather than a government agent, was decisive in rendering the statement non-"testimonial."[50] An appellate court in California reached the opposite conclusion on very similar facts.[51]

Treatment of 9-1-1 Call.

Another major conflict exists as to the treatment of emergency calls to 9-1-1 numbers. These calls involve sub-issues having to do with the treatment of excited utterances/spontaneous declarations; the distinction between statements made to public agencies and to private organizations conducting public functions; and issues dealing with whether the only perspective that matters is the appreciation of the witness/declarant that he or she is making a "testimonial" statement or whether the intention of the person receiving the statement is also considered. Two courts in New York took radically different views of whether 9-1-1 calls were covered by *Crawford* or whether they were generally outside the scope of the opinion.

The New York court in *People v. Moscat*[52] found that such a statement was not "testimonial" because it was not the equivalent of formal pretrial examination but rather it was typically made by the victim as a cry for help for the purpose of saving her life.[53] By contrast, another New York court in *People v. Cortes*,[54] reached the opposite result. Rather than the caller's perspective, it focused much more on the standard protocols followed in New York and most jurisdictions by the receiver of 9-1-1 calls that have the operator work through a

series of questions designed to establish facts that would be significant to any prosecution that might result from the call.[55]

VI. The Remains of the Old System

Another general unresolved issue is what remains of the "Old System" under *Ohio v. Roberts* and whether that system will have any continuing application to statements determined to be non-"testimonial" under *Crawford*. In *Roberts*, Justice Blackman articulated a general standard of trustworthiness/reliability for all hearsay where the declarant was unavailable that created the now-familiar term "firmly rooted hearsay exception," which was an automatic route to satisfying the Confrontation Clause in many situations. As part of a summary, the opinion stated:

> [the] statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[56]

The *Crawford* Court did not indicate what, if any, part of that system will remain operable. One part of it is clearly gone. When statements are "testimonial" as defined by *Crawford*, the reliability/trustworthiness analysis is irrelevant, and only cross-examination or one of the other limited exceptions described above avoid a "STOP SIGN" under the Confrontation Clause. The *Roberts* system is thus obliterated as to "testimonial" statements.

Two alternatives are possible for non-"testimonial" statements in the future. Perhaps *Roberts*' reliability/trustworthiness analysis remains the operative test as to all non-"testimonial" statements. The other obvious competitor is that the Confrontation Clause has nothing whatsoever to say about non-"testimonial" statements, and admissibility depends only on satisfying hearsay restrictions. Justice Scalia, in his opinion in *Crawford*, entertained the possibility of resolving this uncertainty and revising the Confrontation Clause to apply "only to testimonial statements, leaving the remainder to regulation by hearsay law."[57] He observed that this proposal had been in fact considered and rejected in *White*, but also noted that "our analysis in this case cast doubt on that holding."[58]

Resolving this question will not have a huge impact because the Confrontation Clause was generally easily satisfied under the *Roberts* test as to most admissible hearsay, and indeed, admissibility under *Roberts*' reliability/trustworthiness analysis was most often decided automatically when the statement met a broadly accepted and long established ("firmly rooted") hearsay exception. How this pathway to admissibility is defined will matter, however, when non-"testimonial" hearsay that is highly unreliable and fits no exception is offered. Examples could easily be imagined as to statements by children in child sexual abuse cases. Some of these statements will be considered "testimonial,"[59] but where the dividing line will be located in statements made by children to family members, doctors, school teachers, social workers, and police officers is yet to be determined. In states that have a broad catchall hearsay exception or a similarly general hearsay exception that applies to children, one can imagine that some of these statements might be found lacking in reliability under *Roberts*, particularly given that under *Idaho v. Wright*[60] reliability/trustworthiness may not be proved by corroboration of the truth of the statement through external evidence.[61] Therefore, whether the "Old System" still applies has real significance.

VII. Conclusion

Crawford has clearly had a substantial impact on criminal prosecutions by giving teeth to the Confrontation Clause in several frequently encountered and particularly important areas. Statements made by co-participants in crime to authorities during police interrogation can no longer be received against a criminal defendant.[62] Such statements are now clearly excluded, absent limited exceptions. In the areas covered or arguably covered by *Crawford*, courts are treating Confrontation Clause claims with a seriousness not seen in years.

In the area of domestic violence prosecutions, the impact of *Crawford* may be substantial, but the full ramifications of the decision will take some time to be resolved. In these cases, frequently the complaining witness (usually the wife or girlfriend) is unavailable at the time of trial. In many jurisdictions, prosecutors have looked for ways to prosecute these crimes when the alleged victim is absent, and hearsay statements made in 9-1-1 calls and to emergency and medical personnel and investigating officers have been frequently used as an effective alternative method of proof. Whether those alternatives will remain at all viable will likely depend on how broadly "testimonial" statements are defined and how liberally forfeiture through wrongdoing is interpreted.

How significant the impact of *Crawford* will be in child abuse prosecutions is perhaps the most uncertain of the areas where problematic hearsay is important to successful prosecution. How "testimonial" will ultimately be defined as to important categories of statements frequently used in these cases is very unsettled. These include statements frequently used in these cases—statements to examining doctors (and occasionally family members) under one exception (Rule 803(4)) and statements to family members, school teachers, social workers, and police officers responding to various levels of suspicion of abuse under several others (e.g., Rule 803(2), the residual exceptions, special exceptions for children's testimony).

The landscape has clearly been radically altered. That much is clear. However, the incomplete answers given by the Court to key questions means that much remains unclear and yet to be decided. ■

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Endnotes

1. 124 S. Ct. 1354 (2004)
2. *Id*. at 1357.
3. 448 U.S. 56 (1980)
4. *Id*. at 66.
5. *Crawford*, 124 S. Ct. at 1358.
6. *Id*. at 1374.
7. *Id*. at 1363.
8. *Id*. at 1359.
9. *Id*. at 1364.
10. *Id*.
11. *Id*. at 1374.
12. *Id*. at 1370-71.
13. *Id*. at 1364
14. *Id*. (quoting Brief for Petitioner at 23).
15. *Id*. (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).
16. *Id*. (quoting Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* at 3).
17. *Id*. at 1374.

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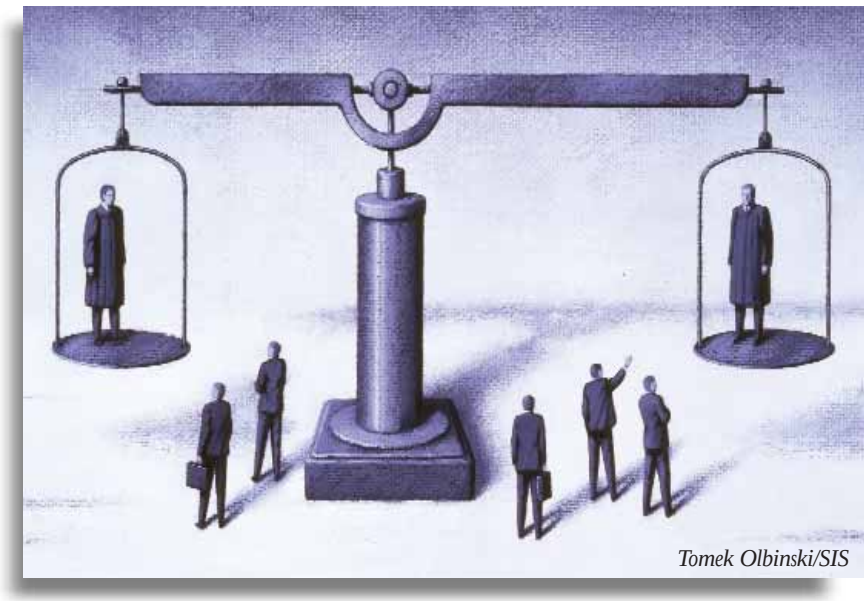
Judicial Independence as a Campaign Platform

BY SHIRLEY S. ABRAHAMSON

"Good judging is good politics….the public will support judges whom they perceive as independent even if they do not agree with particular decisions. But judges have to talk about judicial independence and make it a campaign issue. Over the past 25 years, and in each of my elections, the concept of judicial independence has played a prominent role in my discussions with the public."[1]



Tomek Olbinski/SIS

The Current State of Judicial Campaign Speech

Candidates campaign for public office by stating views and opinions on the hot issues of the moment. Nationally, 87% of all state judges face an election within 39 states.[2] Judicial elections, however, are different from executive or legislative branch elections because judges are different from other elected officials: judges base their decisions on the facts and law presented in each individual case, not on their personal viewpoints on policy issues. Unlike other candidates, judges cannot campaign by making promises about how they'll decide issues. Constraints are placed upon judicial candidates in all states by canons of judicial conduct, and limits are placed on a judge's ability to sit on a case if the judge "decides" the case during a campaign. State codes of judicial conduct in states with judicial elections also limit the political activities of judges.[3]

Restrictions on judicial campaign speech were designed to maintain judicial impartiality and the perception of that impartiality. The traditional view is that if a judge comments on

a pending or impending case, the comments will reduce the litigants' and the public's confidence in the impartiality and fairness of our courts.

In *Republican Party of Minnesota v White*, decided on June 27, 2002, the United States Supreme Court held that the portion of Canon 5(A)(3)(d)(i) (2000) of the Minnesota Code of Judicial Conduct, providing that a "candidate for a judicial office, including an incumbent judge" shall not "announce his or her views on disputed legal or political issues," violates the First Amendment. In response to the United States Supreme Court decision in *White*, the American Bar Association amended its Model Code of Judicial Conduct.

Since the *White* decision, judicial candidates have been receiving more questionnaires than ever before from special interest groups asking them to reveal their views on a variety of issues. Sample questions include, "Have you ever cast a public vote relating to reproductive rights?" and "Do you support the death penalty?"

Many judicial candidates are choosing not to exercise their First Amendment rights fully because they are concerned that they may tarnish the public's perception of fairness and impartiality and may disqualify them from sitting on cases. But that reasoning does not require a judicial candidate to be silent during an election. Judges and judicial candidates can and *should* speak on the issue of judicial independence.

Free to Speak on Judicial Independence

Judges and candidates are legally and ethically free to speak about the critical importance of judicial independence. In any judicial selection system, the best way to ensure judicial independence is to develop the public's understanding of, and respect for, the concept of judicial independence.[4] Lawyers and judges must educate the public on judicial roles and duties. Educational efforts should not be restricted to elections or times of crisis. Judges and lawyers must be community educators using a variety of tools to reach the public, the media, and the executive and legislative branches of government. Public outreach efforts promote judicial independence because they enable citizens to evaluate critical attacks on judges and to value judicial independence.[5]

The points that should be addressed in this education effort are:

- What is judicial independence?;
- Why is judicial independence important to you, the citizen?;
- What are the threats to judicial independence?; and
- How can judicial independence be protected?

What is Judicial Independence?

"The law makes a promise—neutrality. If the promise gets broken, the law as we know it ceases to exist."

- Supreme Court Justice Anthony M. Kennedy[6]

Judicial independence means that judges decide cases fairly and impartially, relying only on the facts and the law. Individual judges and the judicial branch as a whole should work free of ideological influence. Although all judges do not reason alike or necessarily reach the same decision, decisions should be based on determinations of the evidence and the law, not on public opinion polls, personal whim, prejudice, or fear, or interference from the legislative, the executive branches, or private citizens or groups.

There are two types of judicial independence: decisional independence and institutional independence (sometimes called branch independence). Decisional independence refers to a judge's ability to render decisions free from political or popular influence; decisions should be based solely on the facts of the individual case and the applicable law. Institutional independence describes the judicial branch as a separate and co-equal branch of government with the executive and legislative branches.[7]

Any discussion of judicial independence needs, however, to be joined with a discussion of accountability. As Roger Warren, President Emeritus of the National Center for State Courts, stated, "the rule of law itself is a two-edged sword" because it not only ensures the protection of rights, but also enforces responsibilities.[8] The rule of law holds government officials accountable to those in whose name they govern to prevent abuse of power, and the judiciary is not exempt from accountability. Judges are accountable to the public to work hard, keep their dockets current, educate themselves about changes in the law, and treat each person with respect and dignity. Judges are accountable to represent the judicial branch before the public and other branches of government and to advocate for court reform.

Why is Judicial Independence Important to You, The Citizen?

Judicial independence is a means to an end—the end is due process, a fair trial according to law. Judicial independence thus protects the litigants in court and all the people of the nation.

What Are The Threats to Judicial Independence?

Historically, threats to judicial independence have come from the legislative and executive branches. Executive and legislative leaders have at times tried to influence judicial outcomes. Today, issues that have triggered such attempts include reapportionment, school funding, reproduction rights, gun control, tort reform, and affirmative action.[9] Other governmental threats to an independent judiciary are:

- Poor inter-branch relationships between the judiciary, the legislature, and the executive, marked by a lack of communication;
- Legislative limits on or curtailment of judicial jurisdiction;
- Legislative refusal to increase judicial salaries; and
- Chronic under-funding of the judicial branch and increasing workload.

More recently, non-governmental groups have threatened judicial independence using political, social, and economic resources to influence the selection and retention of judges.[10] The danger is that when individuals or groups are highly organized, ideologically driven, and well funded, their self-interest in winning cases overcomes their interest in an independent judiciary.[11] More specific threats to judicial independence by non-governmental groups include:

- Inappropriate threats of impeachment prompted by particular judicial decisions;
- Political threats intended to influence a judge's decision in an individual case; and
- Misleading criticism of individual decisions.

The best judges are those who resist threats to judicial independence and actively advocate judicial independence. The basic, underlying safeguard for judicial independence is popular support of the concept.[12]

How Can Judicial Independence Be Protected?

Public education efforts about judicial

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Delivering a Good Oral Argument: Ten Principles to Keep in Mind

By: Alan D. Woodlief Jr.

When I presented an oral argument before the North Carolina Supreme Court last fall, I drew on the lessons I learned in moot court almost a decade ago and the lessons my colleagues and I now share with the law students on Campbell's current moot court teams.[1] The experience reinforced my belief that good oral advocacy in the moot court world equates with good oral advocacy in the real world and that the principles employed in moot court can aid the practitioner faced with presenting an oral argument in the courts of this state. There are hundreds of principles and rules that could be mentioned, but this article will highlight ten principles that we consistently stress to our moot court students and that I believe can significantly improve any oral argument. While much of the discussion in this article will focus on oral arguments in the appellate courts, most of these rules and principles will apply with equal force in the trial courts.

Before turning to the ten principles, it is appropriate to mention the importance of oral argument. Of course, many cases are decided at the motion stage in the state trial courts, and oral arguments presented during motion hearings undoubtedly play a critical role in the trial court's decision-making process. Oral argument is important in the appellate courts as well. While the North Carolina Court of Appeals may not grant oral argument in every case, it does hear oral arguments in a substantial number of cases, and the North Carolina Supreme Court hears oral arguments in all of the cases before it. Oral argument in the appellate courts serves two important purposes: (1) it affords counsel the opportunity to bring together various aspects and issues of the case into a single integrated theme; and (2) it allows counsel to respond to the court's concerns.[2] Furthermore, even though it is true that most appeals are not won at oral argument, some may be lost there. As Justice Ruth Bader Ginsburg has stated, "In my view [oral argument] is in most cases a hold-the-line operation. In over 18 years on the bench, I have seen few victories snatched at oral argument from a total defeat the judges had anticipated on the basis of the briefs. But I have seen several potential winners become losers in whole or in part because of clarification elicited at argument."[3] By following the ten principles below, the practitioner should improve her chances of holding the line and preserving victory during oral argument and, perhaps in a few cases, snatch victory from the jaws of defeat.

Know your record. My colleagues and I admonish our students to know the record "backwards and forward." In some ways, this is easier for the real lawyer because, instead of being provided a "canned" record for a moot court competition, the real lawyer has lived and breathed the case since day one. Still, there will be occasions where appellate counsel did not represent the client in the trial court and, in those instances, the appellate counsel will have to expend considerable time and energy becoming intimately familiar with the record. Obviously, this familiarity will be necessary in formulating the arguments in the written brief. However, it will also pay dividends during oral argument, particularly as counsel faces

questions about which portions of the record support or undercut her argument.[4] It is not enough to know the procedural history and facts of the case in general terms. Instead, counsel must be prepared to direct the court to the specific page or pages in the record or transcript where the relevant information may be found. A precise reference to the record will often answer a judge's question and cut off further questioning about the basis for counsel's argument. In addition, subjectively, nothing impresses a panel more than counsel's seemingly effortless command of the record. Accordingly, counsel should spend the necessary time to become thoroughly familiar with the record.[5]

Limit your argument to your two or three main points. In the written brief, an attorney often makes every possible argument in support of her position.[6] However, regardless of the number of issues discussed in the brief, counsel should limit oral argument to the two or three issues most critical to her client's appeal. With the limited amount of time available, it is unlikely that counsel can do justice to more than two or three issues. In addition, limiting the number of issues addressed avoids diluting the force and impact of the most critical issues and distracting the court with minor points. Of course, the advocate must be prepared to discuss any issue raised in the briefs if the court turns to an issue the advocate did not intend to emphasize. When reaching its decision and writing the opinion, the court will likely turn first to the limited issues addressed during oral argument and will recall the strong, focused arguments made with regard to these issues.

Provide the court with a "roadmap" of your argument early on. Having selected the two or three most critical issues to address during oral argument, the next step for counsel is to select the two or three most important arguments that need to be made regarding each issue. Undoubtedly, counsel will prepare an outline of her argument organizing how, and in what order, she will cover each issue and supporting argument, with the strongest argument always being covered first. Unfortunately, counsel often fails to share this outline with the court. Without this roadmap, oral arguments seem to lack organization and tend to meander from point to point aimlessly. By contrast, with a roadmap in place at the beginning of the argument, the court does not have to speculate about the points counsel intends to make in oral argument. The court will be thankful for the aid this roadmap provides in following counsel's argument and will be impressed with the thought that went into organizing the argument. In addition, the roadmap reinforces the main points of the argument, since by the time the court has heard the roadmap, the main argument, and the conclusion (discussed below), it will have essentially heard the main points of the argument three times.[7] While organization and preparation of the roadmap takes a significant amount of time on the front end, the dividends they pay make them well worth the effort.

Do not read your argument, rely too heavily on your notes, or memorize your argument. The first-year law student giving her first moot court argument and the practitioner presenting her first oral argument will often make the same mistake: they will write out a speech that they will attempt to read to the court during oral argument. Oral argument is not the forum for making a speech. First of all, the argument should be presented in a conversational tone, a quality absent from most speeches. In addition, given the give and take nature of oral argument (responding to questions will be addressed below), it is difficult for counsel to stay "on speech" for the entire argument. Memorization is little better than reading, since it only frees the advocate to look up and make eye contact with the bench more frequently, but does not change the fact that the advocate is giving a speech. Rather than memorizing a lengthy presentation, counsel should prepare an outline of her argument and practice presenting this outline. Ideally, counsel will take only a manila folder to the podium. This is the rule we use with our moot court students. On the left-hand side of the inside of the folder, counsel may have a list of the relevant cases, statutes, and other authorities, with brief reminders of what these authorities are about or brief quotations of particularly relevant statutory language. This side is a safety net for the advocate in the event that a case name escapes her or the court asks her to quote the statutory language at issue verbatim. On the right-hand side of the folder, counsel may include her argument outline or a bullet-point list of her key points. Again, this side is simply a safety net designed to remind the advocate of the points she wants to make; counsel cannot read or rely on notes that are not there. One of my colleagues encourages our moot court students to practice their arguments enough that they feel comfortable with simply writing the word "smile" or a smiley face on the right-hand side of the folder. Most still include the outline but, in any event, they avoid reading or presenting a memorized speech, and their arguments are more effective for it.

Be responsive to your opponent's main contentions. Obviously, on rebuttal, the appellant will respond to the appellee's main contentions. Both the appellant and appellee will also want to address opposing counsel's primary contentions during their arguments in chief. However, the advocate should avoid making opposing counsel's argument for her and beginning her responses with phrases like, "Appellee will argue . . . ." Instead, counsel should present her own argument, making sure to weave in points and authorities that counter opposing counsel's position.

Be responsive to the judges' questions. From the judges' perspective, answering their questions is the whole purpose of oral argument. Likewise, the advocate should welcome questions, as they are "a window into the judge's mind."[8] When a judge interrupts the argument with a question, counsel should stop, listen intently, and then answer the question. If possible, a question should be answered with yes or no followed by reasons for this answer. Even if the question cannot be answered with yes or no, it should be answered directly. An answer should never seem evasive or less than fully responsive to the question. Particular care should be taken when responding to questions asking for a concession. While counsel may admit a weak point in her argument, she should not concede a point crucial to the success of her argument. Care must also be taken in answering hypothetical questions. While a response to a hypothetical question might include the statement that "this is not the case here," ultimately the response should go further and venture an opinion on the hypothetical situation.[9] Finally, while questions and answers are an important part of the oral argument, the argument is not merely a question-and-answer session. Accordingly, after providing her best, most responsive answer to a question, counsel should try to weave back into her planned argument in light of the direction and emphasis indicated by the judges' questions or concerns.

Maintain your credibility. The Rules of Professional Conduct require attorneys to be candid in their dealings with the court. While an advocate should make every effort to distinguish negative authorities, she must still dis-

close the existence of these authorities. Further, while counsel will want to stress key facts that favor her client and downplay unfavorable ones, she cannot hide adverse facts. Counsel should be scrupulous in representing the contents of the record and cited authorities and should avoid even the appearance of misrepresenting or mischaracterizing them. If the court is left with the impression that counsel has misrepresented the record or authorities, counsel will lose all credibility with the court, and the court will be less likely to accept counsel's position.

Avoid common stylistic problems. As mentioned above, an oral argument should be a conversation or dialogue between counsel and the court. Counsel should make eye contact with all of the judges on the panel. Counsel should also speak "clearly, slowly, [and] with a full voice."[10] Distracting mannerisms, such as jingling coins, should be avoided. Verbal pauses or fillers, such as "ums" and "ahs," can also become distracting and interfere with the court's ability to concentrate on the substance of the argument. Counsel should avoid the excessive use of hand or arm gestures, i.e., "talking" with the hands, as this can also distract the judges. The common theme among most of the stylistic problems mentioned above is their tendency to distract the court from the contents of the argument. In addition to these specific examples, counsel should attempt to avoid any mannerisms or actions that may detract from her argument.

Close strong. Because the conclusion is the last thing the judges will hear, the advocate should close with a strong and forceful ending. When concluding the oral argument, counsel should summarize her main points and encapsulate the heart and theme of the case in a few sentences. The conclusion should also ask the court for the precise relief sought, such as an affirmance or reversal of the decision below.

The ten principles discussed above are not intended to constitute an exhaustive list of rules and principles for presenting an effective oral argument; however, they are a good start. They have proven effective over the years in the moot court setting and should prove beneficial to the practitioner preparing for and delivering her next oral argument. By employing these principles, counsel should be well positioned to seize on this final opportunity to persuade the court to decide in her client's favor. ■

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Endnotes

1. I am indebted to Professors Richard Lord and Gregory Wallace, with whom I have coached Campbell's moot court teams since 1995. Many of the rules and ideas expressed in this article are those we consistently stress to our moot court teams.
2. *See* Henry D. Gabriel, *Preparation and Delivery of Oral Argument in Appellate Courts*, 22 Am. Jur. Trial Advoc. 571, 573 (1999).
3. *See* Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. Rev. 567 (1999) (quoting remarks delivered in a 1991 program on appellate advocacy sponsored by the D.C. Bar/George Washington University National Law Center).
4. *See* Gabriel, *supra* note 3, at 575 (noting that, because "the court likely will be less familiar with the record than counsel will," "[t]his is the one area that counsel can best help the court with in oral argument").
5. *See* Gabriel, *supra* note 3, at 572 (quoting John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895(1940)). Mr. Davis argued 140 cases in the United States Supreme Court and published the ten commandments of appellate argument. Gabriel found only two of Mr. Davis' commandments immutable, one of which was "know your record from cover to cover." Interestingly, the other commandment found to be immutable by Mr. Gabriel was number ten: "sit down." *Id.*
6. In fact, under Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure, an issue will be considered abandoned if a party fails to include citations to relevant authority or to the portions of the record to which the argument pertains. *See State v. Smart*, 99 N.C. App. 730, 394 S.E.2d 475 (1990) (deeming an assignment of error abandoned where appellant failed to include authority for his position).
7. It is the author's understanding that this presentation method was perfected by IBM, which taught its sales people to structure their presentations as follows: tell them what you are going to tell them, then tell them, and finally tell them what you have told them. This consistent repetition of the same theme reinforces the message and its impact on the listener.
8. *See* Jason Vail, *Oral Argument's Big Challenge: Fielding Questions from the Court*, 1 J. App. Prac. & Process 401, 401-402 (1999).
9. Ginsburg, *supra* note 4, at 569 (noting that judges often ask hypothetical questions because they realize that the opinions they write generally will affect more than the case currently before the court).
10. Ginsburg, *supra* note 4, at 569.

Lapsus Linguae[1]

By Judge Marty McGee

Legal proceedings are not *usually* laughing matters, but sometimes, people say things in court that are irresistibly funny. Since several people were kind enough to submit stories, I am back with another edition of my column.

Vintage Judge Warren

From Judge Bob Warren, Concord, NC. Judge Warren is now retired, but he previously served as a city court judge, county recorder's court judge, district court judge and chief district court judge. He shared several stories with me including the following.

Judge Warren had the following interaction with a male victim in an assault case:

Judge: Where were you cut?

Victim: I was cut from my breast bone to my *tentacles*.

In another case, after Judge Warren found a defendant guilty on two charges, the sentencing went as follows:

Judge: That will be $25 and the cost....

Defendant: (Sarcastically) I got that right here in my left pocket.

Judge: Do you have 30 days in your other pocket? Because that is what I am giving you on your second case.

I'll Take My Chances

From Judge Ron Spivey, Winston-Salem, NC. The following exchange took place regarding a defendant's right to counsel:

Judge Spivey: Do you want to represent yourself, hire your own attorney, or seek court appointed counsel?

Defendant: I believe I'll represent myself this time. Last time I had a lawyer, and I got five years in jail.

A Traffic Charge

From Judge Ron Spivey, Winston-Salem, NC. A defendant in traffic court entered his plea as follows:

Defendant: Judge, they've charged me with driving reckless without due caution and *circumcision*. I can assure you that's not true.

An Unusual Degree of Intoxication

From Judge Ron Spivey, Winston-Salem, NC. A DWI defendant wrecked his car and it caught fire. The responding officer pulled him from the burning vehicle. The following exchange took place during the trial:

Prosecutor: Officer, how would you describe the defendant's degree of intoxication at the time you arrived?

Officer: Well, I'd say he was pretty well lit.

A Reason to Miss Court

From Judge Michael Knox, Concord, NC. An attorney recently made the following motion on behalf of his client in a criminal case:

Attorney: Your Honor, we would like to continue this case because my client is having *PREGNANCY* induced this morning.

What Did He Say?

From H.M. Whitesides Jr., Charlotte, NC. Years ago when Mr. Whitesides was an assistant district attorney in Mecklenburg County, a vice officer in an indecent exposure case that occurred in a topless bar testified as follows:

Officer: The defendant pulled down her G-string and showed me her *volvo*.

Where's the Proof?

From Judge Robert Cilley, Rutherfordton, NC. Judge Cilley writes of a man named Kedzie who was charged in his district with setting a fire to a field. It was suspected that Kedzie set the fire in hopes that the wind would blow it towards his mother-in-law's house, who happened to live nearby. At trial, the investigating officer testified that he saw the defendant bend over and a flame appeared as he stood up. The defendant, however, later testified that a passing car had ejected a great number of cigarette butts, all of which the deputy had unaccountably missed, but which surely explained the fire. On cross-examination, the assistant district attorney, who had known the defendant since early childhood, engaged in the following interaction with his old acquaintance:

State: Now, Kedzie, isn't it really true that you were the one who started that fire?

Defendant: Yes, but you can't prove it!

A Hearsay Objection

From Jim Carpenter, Greenville, SC. Mr. Carpenter reports that approximately ten years ago he represented a crisis pregnancy counsel ministry located next door to an abortion clinic. The abortion clinic sued Mr. Carpenter's client along with a pastors' group concerning sidewalk protests. During the trial, one of the pastors testified that he was doing exactly what God had told him to do. The following exchange took place:

Defendant's Attorney: What did God tell you to do?

Plaintiff's Attorney: (Jumping to her feet and slapping both hands on counsel's table) Objection, hearsay.

Mr. Carpenter said that after the ruckus subsided, the judge "ruminated aloud about whether the statement was offered for the truth of the matter asserted, whether the Declarant was present in the courtroom and decided that He was, but also decided that the Declarant was probably beyond the subpoena power of the court, not on anyone's witness list, and not susceptible to cross examination." The objection was sustained.

The Verdict

From Randell Hastings, Concord, NC. Mr. Hastings's suspicions about the jury that had just rendered a verdict against his client were heightened by the following exchange between the judge and the jury:

Judge: This is your verdict, so say you all?

Jury: (In unison) You all.

The Victim

From Magistrate Bill Baggs, Concord, NC. A decade or so ago, a "victim" arrived at the magistrate's office seeking to take out a warrant on his roommate. When asked what crime his roommate committed, the victim said: "He stole my marijuana and I want to charge him for it."

A Demand for a Jury Trial

From Benjamin Baucom, Concord, NC. One of Mr. Baucom's clients asserted his innocence and repeatedly told him that he "ain't going to take no *flea* bargain." ■

Judge McGee is a district court judge in Cabarrus County. Contributions to Lapsus Linguae can be forwarded to: Judge Marty McGee, PO Box 70, Concord, NC 28026 or Martin.B.McGee@nccourts.org.

Endnote

1. This is the Latin term for a misstatement or a slip of the tongue. See the following cases: *State v. Terrell*, COA03-89, 586 S.E.2d 806 (10-21-2003): "It is the general rule that a misstatement by the court, termed lapsus linguae, 'will not be held prejudicial if not called to the attention of the court and if it does not appear that the jury could have been misled by the statement.'"; State v. Mason, COA02-1115, 583 S.E.2d 410 (8-5-2003): "during oral argument, his attorney committed a lapsus linguae—a slip of the tongue—by asking the jury to find him guilty."

Judicial Independence (cont.)

independence and judicial selection face a number of challenges, including limited public knowledge of courts and judges and limited resources to reach a broad public audience. Fortunately, experience has shown that the public is receptive to messages concerning the impartiality of the judiciary and that lawyers and judges are effective messengers, especially when partnering with non-lawyer membership organizations, like the League of Women Voters.[13]

If judges include judicial independence as a campaign issue in their election and retention campaigns, the public will respond with an eagerness to learn more. The public's appreciation of and respect for judicial independence is the best way to ensure that the judiciary will remain independent.[14] Campaigning on judicial independence can educate both judges and the electorate on the importance of protecting fair and impartial courts. ■

Shirley S. Abrahamson, Chief Justice of Wisconsin, is chair of the Board of Directors of the National Center for State Courts and president of the Conference of Chief Justices. Chief Justice Abrahamson is recognized as a national leader in state courts issues, such as protecting judicial independence, improving interbranch relations, and expanding outreach to the public.

The National Center for State Courts, headquartered in Williamsburg, Va., is a non-profit court-reform organization dedicated to improving the administration of justice by providing leadership and service to the state courts. In 2000, the National Center held the first-ever National Summit on Improving Judicial Selection and continues its work in this area. For more information on judicial independence and judicial elections, please visit the National Center for State Courts' website at www.ncsconline.org.

Endnotes

1. Shirley S. Abrahamson, "Speech: The Ballot and the Bench," 76 N.Y.U.L. Rev. 973, 986 (2001).
2. Call to Action: Statement of the National Summit on Improving Judicial Selection, Expanded with Commentary, The National Center for State Courts 2002, www.ncsconline.org/D_research.
3. Effective Judicial Campaign Conduct Committees: A How-to Handbook, National Ad Hoc Advisory Committee on Judicial Campaign Conduct (2004). *See also*, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (Ginsburg, J., Dissenting).
4. Shirley S. Abrahamson, "Speech: The Ballot and the Bench," 76 N.Y.U.L. Rev. 973, 977 (2001).
4. Shirley S. Abrahamson, "Speech: The Ballot and the Bench," 76 N.Y.U.L. Rev. 973, 993-4 (2001).
6. Address to the American Bar Assn Symposium, Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice, Dec. 4-5, 1998.
7. http://www.ajs.org/cji/cji_whatisji.asp
8. Warren, R. (2003) "The Importance of Judicial Independence and Accountability," Unpublished speech in China available on the National Center for State Courts' Website: www.ncsconline.org/WC/Publications/KIS_JudIndSpeechScript.pdf.
9. Shirley S. Abrahamson, "Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence," 64 Ohio St. L.J. 3 (2003).
10. *Id.* at 9.
11. *Id.* at 9.
12. Shirley S. Abrahamson, "Speech: The Ballot and the Bench," 76 N.Y.U.L. Rev. 973, 990 (2001).
13. http://www.justiceatstake.org/contentViewer.asp?breadCrumb=2
14. Shirley S. Abrahamson, "Speech: The Ballot and the Bench," 76 N.Y.U.L. Rev. 973, 977 (2001).

Wake Forest's Award Winning Professionalism Program

BY DEAN ROBERT K. WALSH

During the August 2004 annual meeting of the American Bar Association meeting in Atlanta, I had the honor of accepting the E. Smythe Gambrell Professionalism Award for the Wake Forest School of Law. The Gambrell Award is presented by the ABA Standing Committee on Professionalism to bar associations, law schools, law firms, or law related organizations recognizing excellent projects that enhance professionalism among lawyers. The 2004 award to Wake Forest recognized the law school's comprehensive three-year program.

Lael Henderson/SIS

Wake Forest emphasizes the importance of professionalism from orientation through the third year in a variety of individual but deliberately connected settings. The ABA selection committee was particularly impressed with the "depth and excellence" of the Wake Forest program.

The program's basic premise is that students should be exposed to a variety of professional role models that they can then emulate later in practice. Each component of the Wake Forest program introduces exemplary lawyers and judges to the students and exposes them to the professional values of these men and women. As I emphasize in my talk to the first-year students on the first day of orientation, it is highly important for them to read the biographies of great lawyers and find heroes and heroines of the law to emulate. Beginning students are typically blank slates with respect to the values of the legal profession. They learn these values in important ways by studying their first mentors or role models in the law.

We begin professionalism education even before our students arrive for orientation. Before orientation, entering students are required to read a book, such as *To Kill A Mockingbird* or *Gideon's Trumpet*, in which the main character is an outstanding lawyer. During the first day of orientation week, small groups of 8-10 students meet with faculty members to discuss the professionalism issues raised in the selected book and the other

responsibilities that arise in the legal profession.

Orientation week at Wake Forest includes two other professionalism activities. At midweek, students are released from classes to work on a pro bono project within the community. For the past several years, first-year students have joined faculty and staff to work on Habitat for Humanity homes. In addition to emphasizing the importance of community service, this project has a "bonding effect" on the class members and allows students to get to know each other and the faculty in a non-academic and informal atmosphere. The next day, a judge is invited to give a brief address on professionalism to the first-year class and administer a formal oath of professionalism.

Wake Forest's program continues during the first year with a required series of monthly programs on professional issues such as ethical duties, pro bono obligations, civility, substance abuse, and quality of life. Most of these programs begin with a general overview of the topic before breaking out into small groups of 10-12 students to discuss the issues more personally and intensely. Once again, role model lawyers and judges from our community are teamed with faculty members to lead these small group discussions.

These early programs set the stage for more professionalism offerings within the upper-level curriculum. In the upper years, every student is required to take a formal course in Professional Responsibility. For the past few years, in order to create an atmosphere where important issues can be discussed interactively, this course is taught in four sections with only 40 students per section, like our required first-year courses.

Issues of professionalism are highlighted in many other upper-level courses and programs in a pervasive manner, whether the course be Negotiation, Trial Practice, Legal History, or another subject. Our library staff has collected materials on teaching professionalism and made them available to faculty interested in addressing issues of ethics and professionalism in their substantive courses.

Over half of our students take one of our two client-contact clinics before graduation. Each of our clinics has a required two-hour-per-week classroom component that focuses extensively on professional values. In the Litigation Clinic, the students are supervised by a member of our full-time faculty and by supervising attorneys in the field. The supervising attorneys are chosen in consultation with the Clinic Committee of the Forsyth County Bar Association. A strong component in choosing the clinical supervisors is the degree to which they will be professionalism role models. In the in-house Elder Law Clinic, a faculty member supervises the students and individually works with them on the ethical and professionalism dilemmas that arise in these cases.

Wake Forest has also cultivated several extracurricular activities with the common goal of fostering professional values within the student body. Each of these programs brings students together with exceptional role models within our profession.

In 1990, we established the first Inn of Court at our law school in North Carolina. The Chief Justice Joseph Branch Inn of Court meets monthly during the academic year, bringing together experienced trial lawyers and judges, who are designated Masters of the Bench or Benchers. Masters of the Bench are really the faculty of the Inn who have demonstrated superior litigation ability and professionalism. The Barrister members of the Inn are younger lawyers with a few years of litigation experience who are graduated from the Inn every two years. The "pupil" members of the Inn are our Wake Forest law students, currently 51 in number.

The monthly Inn meetings begin in the early evening for a demonstration of particular facets of the litigation process, almost always involving ethical and professionalism issues. After the demonstration, we have a reception and dinner to allow members of the Inn to discuss the technique, ethics, and professionalism issues raised by the presentation. We have a custom during dinner at our Inn which we have for years called "the Rule." We have tables for six at dinner and ask one judge and one lawyer Master of the Bench to be at each table with two barristers and two pupils. We also ask that people concentrate on being at a table with different members at each of the six meetings and not people whom they see regularly.

The Wake Forest faculty has also introduced "A Conversation with . . ." series which brings exemplary legal professionals to the law school to speak in a more informal way to the students. These lawyers and judges are encouraged to talk about why they became lawyers

and tell stories about their experiences in practice. Recent visitors for this series include: Annie Brown Kennedy, one of the first black women to practice law in North Carolina; Judge Norman Veasey, Chief Justice of the Supreme Court of Delaware and chair of the ABA Ethics 2000 Commission; Robert Ehrlich, the current governor of Maryland, and Justice Rosalie Abella, the first woman on the Ontario Court of Appeal in Canada. In late September of 2004, our "A Conversation with . . ." speaker was famed 96 year old civil rights lawyer Oliver W. Hill from Richmond, Virginia, one of the attorneys who, with his law school classmate Thurgood Marshall, litigated *Brown vs. Board of Education*. After each "Conversation," there is a dinner with students selected by lottery at two tables of ten. The speaker moves from one table to the other between the entree and dessert to spend more intimate time with each group of students.

Extracurricularly, our faculty, staff, and students are involved in a variety of activities that stress the values of public service, including our Public Interest Law Organization, the Teen Court, and the Domestic Violence Advocacy Center. This latter group was part of a consortium organized by Professor Suzanne Reynolds and alumnus Chief Judge Bill Reingold with the Forsyth County Bar Association. A few years ago, it won the prestigious Harrison Tweed Award from the American Bar Association. Student and lawyer volunteers provide representation to victims of domestic violence at the ten-day hearing held to determine whether a protective order issued against the abuser *ex parte* should become final. A student in the DVAC program noted: "It provides desperately needed services to victims of domestic violence, and it gives students the opportunity to get into a true court proceeding where they're not doing a classroom project." DVAC recently won the 2004 Law Student Pro Bono Award from the North Carolina Bar Association.

The sum of all these curricular and extracurricular activities is an organized professionalism education program for Wake Forest law students. The lawyers of North Carolina have played a great role in participating in these activities. The Chief Justice's Commission on Professionalism has supported professionalism education activities through grants to all five North Carolina law schools, supporting both our mandatory first-year professionalism series and our "A Conversation with . . ." series. We value highly the contributions by both the organized bar and the individual lawyers in North Carolina. We would welcome any further thoughts that any of you have on how our law school can better educate our students on the important values of our profession. ■

Robert K. Walsh has been the dean of the Wake Forest University School of Law since 1989. He has chaired the North Carolina Bar Association's Bench, Bar, and Law School Liaison Committee for two years. He also was an original member of the Chief Justice's Commission on Professionalism for two years after its founding in 1999.

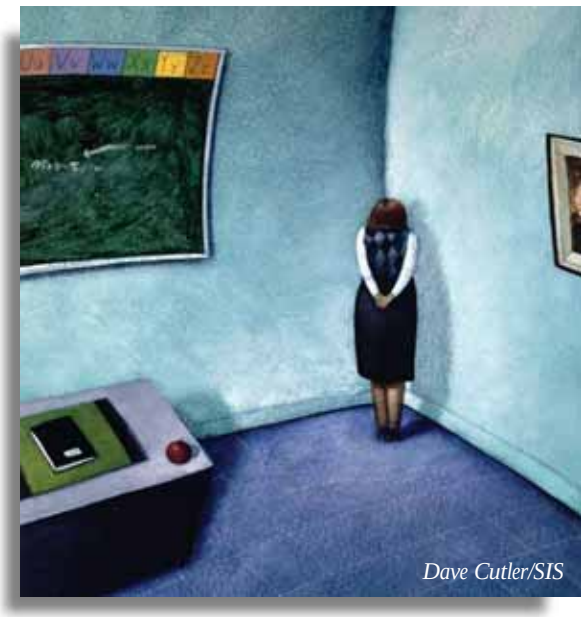
Crawford v. Washington (cont.)

18. *Id*. at 1372.
19. *Id*. at 1364.
20. *Id*.
21. *Id*. at 1367.
22. 502 U.S. 346 (1992).
23. *Id*. at 1368 n.8 (quoting *Thompson v. Trevanion, Skin*. 402, 90 Eng. Rep. 179 (K.B.1694)).
24. *White*, 502 U.S. at 349.
25. *Id*. at 1369 n.9.
26. 399 U.S. 149 (1970).
27. 484 U.S. 554 (1988).
28. *Id.* at 561.
29. *Id.* at 561-62.
30. *Id*. at 1365.
31. *See Barber v. Page*, 390 U.S. 719, 722-25 (1968).
32. *Id*. at 1367-68.
33. *Id*. at 1370 (citing *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879)).
34. *See State v. Meeks*, 88 P.3d 789 (Kan. 2004) (ruling in a homicide case the defendant was charged with killing the declarant as part of a fight that, in allegedly killing the declarant, the defendant forfeited his confrontation rights despite there being no evidence that the killing was for the purpose of silencing the declarant as a witness).
35. *Id.* at 1369 n.9.
36. 471 U.S. 409, 414 (1985).
37. *Id*. at 411.
38. *Id*. at 413-14.
39. *Id*. at 1367 n.6.
40. *Id*. at 1365 n.4.
41. *Id*.
42. 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004).
43. *Id*. at 856-57.
44. *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004), and *Fowler v. State*, 809 N.E.2d 960 (Ind. Ct. App. 2004).
45. *Cassidy v. State*, ___ S.W.3d ___, No. 03-03-00098-CR, 2004 WL 1114483 (Tex. App. Ct. May 20, 2004) (finding the statement outside Crawford); *Wall v. State*, 143 S.W.3d 846, 851 No. 13-02-636-CR (Tex. App. Ct. App. 2004) (taking the contrary view).
46. *State v. Forrest*, 596 S.E.2d 22, 24-30 (N.C. Ct. App. 2004).
47. *See State v. Clark*, 598 S.E.2d 213, 215-16 (N.C. Ct. App. 2004) (treating statements of identification during officer's initial investigation as "testimonial"). *See also People v. Kilday*, No. A099085, 2004 WL 1470795, at *7 (Cal. Ct. App. June 30, 2004) (concluding that "unrecorded, informal questioning in hotel lobby" of victim who was frightened and visibly injured was "testimonial" even if not "interrogation" because it was "part of a police investigation aimed at obtaining testimonial evidence").
48. *Moody v. State*, 594 S.E.2d 350, 353-54 (Ga. 2004) (finding statements made to police during "field investigation" of what victim of later murder had told police shortly after defendant shot into the bedroom in which she had been sleeping was "testimonial" although error was harmless).
49. This issue is covered in detail in my forthcoming article, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICHMOND L. REV. ___ (2005).
50. *State v. Geno*, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (concluding that statement to private interviewer at Child Protective Services was not "testimonial").
51. *State v. Sisavath*, 13 Cal. Rptr. 3d 753, 757 (Cal. Ct. App. 2004) (finding that statements made to an interviewer at a private multi-disciplinary interview center was "testimonial" where formal criminal charges had been filed against the defendant and a preliminary hearing held and both the deputy district attorney who prosecuted the case and an investigator from the district attorney's office were present).
52. 777 N.Y.S.2d 875, 880 (N.Y. Crim. Ct. 2004).
53. *Id.* at 879.
54. 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004). *See generally* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171 (2002) (extensively discussing 9-1-1 calls as a class of statements that the authors contend should generally, if not universally, be considered "testimonial").
55. *Cortes*, 781 N.Y.S.2d at 406.
56. *Roberts*, 448 U.S. at 66.
57. *Crawford*, 124 S. Ct. at 1370.
58. *Id*.
59. *See Snowden v. State*, 846 A.2d 36, 47 (Md. Ct. Spec. App. 2004).
60. 497 U.S. 805 (1990).
61. *Id.* at 819-23.
62. Many of these statements were admitted as statements against interest despite the Supreme Court's decision in *Lilly v. Virginia*, 527 U.S. 116 (1999), which arguably should have resulted in exclusion.

Most of What Lawyers Need to Know to Avoid State Bar Grievances, We Learned in Kindergarten

By C. David Benbow IV

Have you ever awakened from a nightmare where you had been dreaming that Bruno DeMolli was being interviewed by Action 9 News on the front steps of your law office? Have you ever had that dream? You know the one, where your secretary is frantically shredding your files as Dan Rather, microphone in hand, is knocking on your office door.



Dave Cutler/SIS

If you have had that dream or one similar, take heart. There is hope for you. This is because most of what lawyers need to know about State Bar grievances, we've already learned in kindergarten…lessons learned by all of us when we were five, that will help us avoid most State Bar Grievances.

Here are six important lessons from kindergarten for lawyers.

1 Answer "Here!" when your name is called.

What was the first thing your kindergarten teacher did every day? She called roll. It was first because it was very important. It is also very important in practicing law because your clients are calling your name too. They need to know that you are present. They need your help, your expertise, your loyalty, and your time. Be sure to respond when your clients call your name. Promptly return their phone calls, emails, and letters. Remember these clients have chosen you to help them with some of life's most difficult problems. What a special gift our clients give us when they give us their trust.

The best defense against grievances is open, honest, forthright communication between you and your clients. Answer "Here!" when your client calls your name.

2 Don't take things that don't belong to you.

You learned to leave your classmates' snacks alone, not to take their crayons, not to wear coats and mittens belonging to someone else.

This also applies to the practice of law. Leave your clients' money alone. No matter

how desperate you are, no matter how scared you may be, no matter that you are sure that no one will ever know, and no matter that you can pay it back next week…leave your clients' money alone. Period.

3 Be responsible for your mistakes. When your teacher asked, "Who spilled the Kool-Aid all over the floor?" you may have shut your eyes and put your hands in front of your face, thinking, "If I can't see her, she can't see me." You learned that this didn't work.

It won't work when the State Bar sends you an inquiry either. If you receive an inquiry, answer it promptly. Don't hide behind "more pressing matters." Your failure to respond is a violation of the Rules of Professional Conduct in and of itself.

If your answer is too hard to deal with, seek help from an attorney friend, your State Bar Councilor, or from the Lawyers Assistance Program through PALS or FRIENDS. Help (hope) is available. There are caring people who may not know you, but who are willing to get to know you and to help you. After all, isn't that why most of us became lawyers—to help others?

4 Handle your crayons with care. In kindergarten, we learned about crayons. Some were sharp and could be used to color within the lines; some were dull and harder to work with; some were bright colors; some drab; some had strange names like "magenta." Many were different colors. If you pressed too hard on a crayon, it broke. All had to be put back into the same crayon box.

Our clients are like crayons. Be careful with them. Remember, when the legal system is through with them, most go back into the same box. Remember each client is a unique individual who has come to you for help. Respect the dignity of each and every client.

5 Prepare for open house. In kindergarten, you learned to do your best work on projects to be displayed for open house. You were proud because your parents, grandparents, brothers, and sisters were coming to visit your class. You carefully traced the outline of your hand to make the turkey feathers for the Thanksgiving drawing so that it would be the best you could do, because your mom and dad were coming to see it at open house.

As lawyers, often our work is on display. Make it your best. Prepare your work as if tonight were open house and your mom and dad were coming.

6 Share. We learned to share in kindergarten. It is also important for us as lawyers to share our unique talents. Our training and experience qualifies us to make a difference in our community and in our world. Share your talents. Be a catalyst for good.

There you have it. Six kindergarten lessons which you can use in your law practice. If you follow these examples, maybe you won't have those "Dan Rather" nightmares. ■

Statesville lawyer, David Benbow, is a State Bar Councilor who serves on the Grievance Committee.

A Modest Proposal

BY JAN H. SAMET

Whereas, the failure to respond to a grievance is a violation of 8.1(b) of the Revised Rules of Professional Conduct; and

Whereas, there is an unacceptable number of attorneys in North Carolina who have failed and refused either to respond to local or State Bar Grievance Committees; and

Whereas, it is in the interest of the attorneys, the State Bar, and the citizens of the State of North Carolina to have timely responses filed to grievances; and

Whereas, when a grievance is mailed to an attorney by either the local or the State Bar Grievance Committee, said attorney has 15 days from the date of the letter transmitting the grievance to respond to said grievance; and

Now, therefore, be it resolved that upon failure to respond by the 20th day from the date of the mailing of a notice of grievance, the investigator at the State Bar level or the head of the Grievance Committee on the local level shall be authorized to contact a councilor within whose judicial district the non-responding attorney practices and request assistance from said State Bar councilor;

The councilor without being given any particulars concerning the nature of the grievance, will be advised that an answer or response to a grievance is overdue and the councilor will be asked to personally contact the attorney who has failed to make timely response;

The councilor will make a reasonable effort to timely contact the attorney whose response is delinquent and discuss with the attorney the response requirement;

In said discussions, it is the hope of the State Bar Council that should the councilor become aware of any issues that would be appropriately addressed by PALS, Friends, the Lawyer Assistance Program, such reference will be timely made by the State Bar Councilor;

Once the contact has been made by the councilor with the delinquent attorney, the Local Bar Grievance or the State Bar Grievance Committee will be notified of the contact and the date upon which the contact took place;

The attorney who is delinquent in response to the Grievance Committee shall have 15 days from the date of contact by the councilor to file an appropriate response;

Failure to respond within the second 15 day period shall create a rebuttable presumption before the Grievance Committee that discipline up to and including a reprimand is appropriate. In the event that a non-responding attorney shall fail to respond in a timely manner to either the State or Local Bar Grievance Committee on a second and separate occasion there shall be a rebuttable presumption that discipline up to and including censure is appropriate.

High Point attorney, Jan H. Samet, is a State Bar Councilor who serves on the Grievance Committee.

Specialty Certification as an Incentive for Increased Professionalism: Lessons from Other Disciplines and Countries

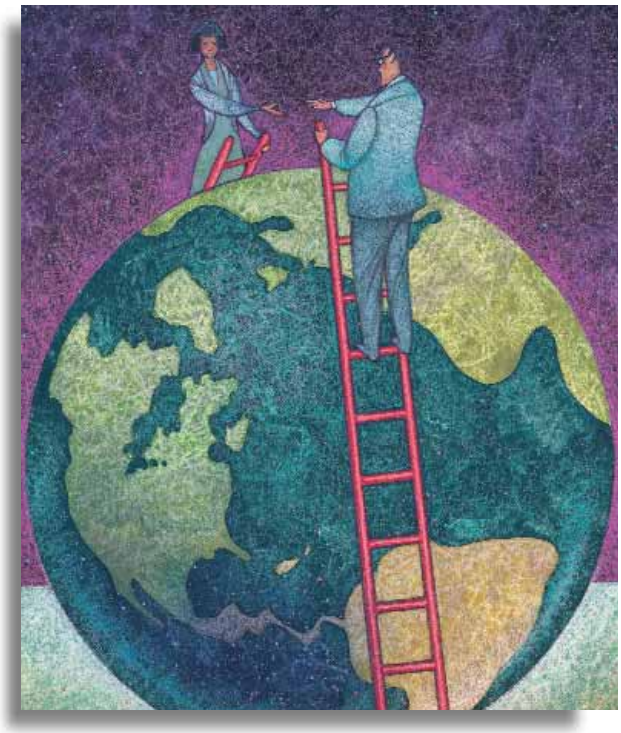
By Adrian Evans and Clark D. Cunningham

I. Introduction

It is now a reasonably common practice in a number of jurisdictions for lawyers with acknowledged experience in a particular area of law to seek peer recognition of that expertise. In general terms, applications for specialist accreditation are made by lawyers after several years in practice and concentrated experience in the area of proposed accreditation. Variously described as "specialized accreditation" or just "specialist recognition," these programs seek to maximize lawyers' self-esteem, referrals, and income while providing useful information to the community as to specialist ability.

This essay suggests that specialist certification offers a model and perhaps a path for a new approach to professionalism in law that could come to resemble accepted approaches in medicine and other professions. Specialization certification in medicine, in which doctors become recognized as "board certified," although voluntary, is now a standard part of professional development for over 90% of all doctors in the United States.[1]

When we speak of professionalism, we are not referring to a kind of requiem for a lost civility among our peers, a lament for something past, but rather a vision of the achievable: the *best* of what lawyers can offer to clients and society, a path that leads to both an apex of altruism and a renewed self-esteem. Professionalism for us is a fusion of technical expertise with demonstrated excellence in client service, public service, and ethical practice. We suggest a harnessing of what has been proven to work elsewhere; public and peer recognition of expertise through specialist accreditation, with some additional measures of achievement in service to clients and the public as well as ethical integrity. In the interests of all stakeholders in access to justice, it is our view that the traditional assessment of competence must now be joined to the new assessment of professionalism.



In the United States, suggestions to improve lawyer professionalism face an apparent paradox. Rigorous training and assessment only take place in America up to the point of bar admission, in law school, and during the short period between graduation and licensure upon passage of the bar exam. After bar admission, further professional development is entirely voluntary (unless employer imposed) except for mandatory attendance at continuing legal education (CLE) programs, which typically require nothing more than mere presence in the audience. The paradox of using preadmission education to achieve professionalism is that professionalism is generally understood to refer to a combination of knowledge, skill, and values that exceed the bare minimum necessary for bar admission.[2] On the other hand, professionalism also means more than mere accumulated experience. The current repertoire of post-admission professionalism programs, passive listening to CLE lectures, discussion groups, and voluntary lawyer organizations that encourage and reward professional excel-

lence provide neither concrete incentives nor reliable measures for the maintenance, much less improvement, of professional knowledge, skill, or values for the post admission lawyer.

Progressive accreditation of specialist attorneys offers a way to continue some of the rigor of the preadmission process into the post admission life of lawyers. Such programs do not seek to challenge an individual's right to basic admission or practice, but do encourage advancement to an institutionally recognized higher, specialized level of practice. After a specified period of practice, lawyers can enter a process of specialist accreditation anytime they wish and, if they do not qualify the first time, can try again when they are better qualified. No rights to basic practice are under threat in this proposal, though we are hopeful that over time and by the process of osmosis, just as has been the case in medical practices, increasing numbers of lawyers will seek of their own free will to become accredited specialists. The public and the legal profession would both gain from higher standards of professionalism as, over time, more attorneys seek this recognition and become prepared to meet its professionalism requirements.

Unfortunately, current specialization assessment in the jurisdictions we describe below tends to be dominated by the measurement of competence, the scrutiny of technique, and the celebration of the intellect, above all else. We suggest that it is time to widen these criteria and adopt, for each jurisdiction, *locally representative* measures of professionalism that add at least two further indicia of true professionalism: service to clients that goes beyond mere delivery of outcomes and high ethical standards put into practice.

In both the United States and Australia, specialty certification usually includes the following "bare minimum" assurances of professional performance in practice:

- a "NIL" disciplinary record in respect of proven intentional *code* offenses
- satisfactory results in continuing legal education
- a positive rating by colleagues and peers as to whether the lawyer is in "good standing."[3]

We believe, though, that much more can be expected and accomplished. First, a brief comparison of specialty certification programs in the United States and Australia will be helpful.

II. Specialty Certification for Lawyers in the United States

In 1921, the prestigious Carnegie Foundation for the Advancement of Teaching published the results of an eight-year study of the legal profession in which one recommendation was that the profession recognize the reality of specialization by providing differentiated law school training.[4] The recommendation did not find a welcome reception, and a series of American Bar Association (ABA) committees appointed to promote specialization between 1952 and 1967 fared no better.[5] The ABA Model Code of Professional Responsibility, adopted in 1969, prohibited a lawyer from "hold[ing] himself out publicly as a specialist" unless certified by a state-authorized entity.[6] In 1970, California became the first state to establish a certification program; over the next 20 years, less than one-third of the other states set up programs to permit specialist certification.[7]

In 1989, the Supreme Court of Illinois, which had not approved a certification program, disciplined an attorney for mentioning on his letterhead that he had obtained a Certificate in Civil Trial Advocacy from a private organization, the National Board of Trial Advocacy (NBTA).[8] The US Supreme Court reversed that decision: "A State may not...completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA."[9] The Court did indicate that a state can require a lawyer who advertises specialist certification to demonstrate that such certification meets "standards relevant to practice in a particular area of the law."[10]

The Supreme Court's 1990 decision in *Peel* resulted in some expansion of state certification programs as well as promulgation by many states of permissive rules that allowed lawyers to advertise specialist certification if certified by "a recognized and bona fide professional entity."[11] The ABA Rules of Professional Conduct (which have replaced the 1969 ABA Model Code of Professional Responsibility) are more restrictive, still prohibiting a specialization claim unless certified by an organization approved by the relevant state or by the ABA itself.[12] As recently reported in one state bar journal, "Certification in [l]egal [s]pecialities [h]as [b]een [s]lower to [c]atch on than [e]xpected," noting that there are still very few private organizations that certify lawyers as specialists.[13] The ABA has only accredited five organizations, including the NBTA.[14]

Nominate an area of law for specialization certification

In March, the Board of Legal Specialization adopted standards for determinging whether to pursue the creation of a new specialty. These guidelines, as well as the proposed specialty survey form and porposed speciality application, can be viewed on the specialization website, www.nclawspecialists.org.

III. Specialty Certification for Lawyers in Australia

Australia has a nine jurisdiction federal system similar to the United States.[15] There are six states, two self-governing territories, and one federal jurisdiction.[16] The eight states and territories have their own separate legal education and bar admission systems and, under the auspices of the national Standing Committee of Attorneys General (SCAG) in conjunction with the Law Council of Australia, are steadily moving towards a nationally "uniform" approach to these issues and all aspects of legal regulation as well. With the exception of the systems for lawyers' discipline, these issues are not regarded as contentious, and legislation to achieve uniformity in all jurisdictions is expected in the next two to three years.[17]

Legal education is controlled by the university-based law schools. While the system is in some flux, a typical law degree leading to conditional admission is a three to five year undergraduate course with many entrants commencing at age 17 to 18.[18] In the more traditional universities, law is often taken with other basic degrees in arts, science, commerce, and, more recently, engineering and information technology.[19] There are 11 prescribed areas of study in the basic Bachelor of Laws ("LLB"), including "Professional Conduct."[20] The content of these areas is controlled by the Law Admissions Consultative Committee ("the Priestly Committee"), formerly known as the "Consultative Committee of State and Territorial Law Admitting Authorities." The Priestly Committee reports to the national Council of Chief Justices.[21]

Law graduates most often seek admission by one of two processes: a one year apprenticeship inside a firm (Articles of Clerkship) which is available in some jurisdictions,[22] or attendance at any one of a number of practical legal training (PLT) courses, which take five to six months and are offered by a number of providers, including law schools.[23] PLT courses must cover 12 key areas of practice, including professional conduct.[24] "Articled Clerks" are not required to undergo specific training in issues associated with professionalism (apart from trust accounting), but are generally admitted unconditionally after completion of the one-year period.[25] Depending on the jurisdiction, PLT graduates are usually admitted conditionally for six months before being eligible for full admission.[26] The usual conditions require supervision of the admittee during that period and prevent the holding of trust money.[27]

The Articles of Clerkship system is under considerable pressure from critics who allege that the quality of supervision available to "clerks" is too variable to ensure uniformly competent outcomes.[28] Despite these criticisms, the Articles system is likely to continue as a route to admission, in tandem with PLT courses, in the interests of a consensus between the states and territories.[29]

In 1989, the state of Victoria, where Australia's second largest city, Melbourne, is located, introduced Australia's first program for accrediting experienced lawyers as subject-matter specialists.[30] Victoria has since been followed by New South Wales[31] (where Sydney is located), Western Australia,[32] and Queensland.[33] All of these jurisdictions have modeled their programs on Victoria's approach, although with some modifications.[34] Victoria now offers certification in 12 areas of legal practice. There are over 800 accredited specialists in Victoria,[35] drawn from a total of nearly 12,000 lawyers.[36] The four Australian state specialization schemes are seeking to develop in a coordinated manner and to encourage similar processes in other jurisdictions.[37]

Victoria's requirements for all specialization accreditation include the following: (1) the equivalent of five years, full-time practice as a lawyer; (2) "substantial involvement" (defined as at least 25% of total workload) in the chosen specialty for at least the immediately preceding three years; (3) a passing score on a written examination; and (4) three positive references from persons who have known the applicant for at least three years, at least one of whom must be a legal practitioner with at least five years of practice experience and significant involvement in the specialty.[38]

These requirements are generally similar to those found in US specialization programs with one significant difference: most US programs define "substantial involvement" very specifically by requiring a minimum number of completed activities such as 25 trials for the criminal law certification in Florida, of which 15 must be felony jury trials.[39] The Australian programs have no such specific requirements and for most accreditations, the applicant need merely provide a statement of the percentage of time spent in the specialized area for each of the prior three years.[40]

The high "substantial involvement" requirements of American programs would seem to make it very difficult for a lawyer to use certification to *develop* a specialization. For example, since most criminal cases are resolved by plea bargain in the United States just as most civil cases are settled, jury trials are relatively rare events unless one is either a senior lawyer in a large practice setting (like an urban public defender or prosecutor's office), where cases likely to be tried are reserved or routed to you, or one is such a well-known trial lawyer that other firms provide a steady supply of trials by referral. The young lawyer trying to develop her own practice or work her way up inside her organization is blocked by such practice requirements from developing the very credentials that should *precede* such extensive trial practice. Thus, US certification programs are built on a dangerous paradox. The American system can only function if a large number of clients are represented by uncertified lawyers who are on the long road to certification and are therefore engaged in precisely the kind of specialized work that clients should demand be done only by certified specialists.[41] This paradox arises out of the origin of American specialty certification as an issue of truth-in-advertising rather than as a method of professional development.

In contrast, while the Australian programs also focus on certifying rather than developing competency, they clearly contemplate that applicants will build specialized competency, not just through on-the-job experience, but also by preparing for the certification process itself. For example, both the Victoria and New South Wales web sites offer ways for applicants to join study groups, which seem to be widely used.[42] The Australian specialist preparation period is likely to be different from any individualized study by an American would-be specialist because of another even more important difference between the two countries. All the Australian certification programs require one or more skill demonstrations in addition to a written examination about substantive law. This combination of assessment methods is intended to be, and is, quite rigorous, as evidenced by a 1994 law review article that reported practitioner complaints about the high failure rate.[43] For example, in New South Wales, the criminal and children's law specialties applicants must conduct a simulated court hearing,[44] and would-be personal injury specialists must undergo a "peer interview" by two examiners during which applicants are questioned as to how they would deal with a variety of professional situations.[45] However, for our purposes, the most important method of assessment is the simulated client interview, which is required for a number of specialties.[46] For example, under the Family Law Accreditation, where uniform standards have been developed for all four certifying jurisdictions in Australia,[47] each applicant must conduct a simulated first-client interview; the exercise takes about 60 minutes and is videotaped. The videotape is assessed by examiners for competence in learning facts, taking the client's instructions, giving advice, discussing options, and developing an initial plan.[48]

The Australian requirement of a simulated interview assessment is a very useful first step toward a developmental approach to specialist accreditation, one that will allow lawyers to improve progressively in demonstrated skills, ethics, and client and public service until they attain a more comprehensive specialist status than is now possible in either the United States or Australia.

IV. Excellence in Service to Clients

The simulated client interview requirement, not found in any certification program in the United States, may have its origin in an important study conducted early in Australia's development of specialist accreditation programs.

In 1995, the Law Society of New South Wales commissioned an evaluation of the Specialist Accreditation Program (then three years old in that jurisdiction) to be conducted jointly by the Centre for Legal Education and Livingston Armytage, a distinguished lawyer who had become a consultant in law practice management and development.[49] One com-

ponent of the evaluation was a survey of specialists' clients. At that time there were 763 specialists in New South Wales who had been accredited in the areas of business, criminal, family, personal injury, and property law.[50] The evaluators wrote to all these specialists asking each to identify four clients: two preaccreditation and two who had retained the lawyer after accreditation. This process yielded 424 clients. The evaluators then conducted discussions with two focus groups drawn from this list. A nine question survey developed with input from these focus groups was then mailed to all 424 clients, of whom 55.2% responded.[51] The survey form included a free response section that asked clients to describe in a few lines "what I liked" and "what I disliked" about "how the job was done."

Although the results of this process indicated widespread client satisfaction with the specialists' legal knowledge and skills, the evaluators also found "consistent evidence of client dissatisfaction with the provision of services, and the quality of the service-delivery process."[52] Their findings "illustrate[d] that practitioners and their clients are selecting divergent indicators of performance with which to assess satisfaction with service."[53]

> Practitioners are concentrating on developing their knowledge and skills to deliver better outcomes; but their clients, expecting both technical competence and results, are being disappointed by the process of getting there. Clients complained about the quality of their lawyers' services in terms of inaccessibility, lack of communication, lack of empathy and understanding, and lack of respect...[54]
>
> The evaluators concluded that
>
> consideration should be given by the profession to introducing additional training to redress identified performance deficits in the related areas of *interpersonal skills* and *client management techniques.* This training should be client focused, rather than transaction focused; it should train practitioners to recognize that client needs are not confined to attaining objective outcomes; and it should help lawyers to listen to clients more attentively, diagnose their various levels of needs and demonstrate empathy. [55]

Given the findings of this thoughtful study, it is disappointing that none of the Australian programs require any kind of assessment of client service which utilizes input from clients. The need for client participation in the assessment of professional excellence is particularly important if, as Armytage and his colleagues found, lawyers are likely to have different or at least more narrow criteria for excellent service than the very people they exist to serve.

Recent research by Professor Avrom Sherr in England indicates that mere experience in practice is no guarantee of professional development in client service.[56] In his study, 143 first interviews with new clients were videotaped and analyzed. Almost 51% of the lawyers were law graduates in training ("articled clerks") and 75.5% were experienced lawyers.[57] Over 70% of the experienced lawyers had been in practice at least six years and 23.3% had more than 11 years of experience.[58] Sherr's overall finding was that practice experience did not result in a significant improvement in interviewing ability. When the videotapes were evaluated by expert assessors, a high percentage of all interviews scored "fairly bad" or worse on all items.[59] In particular, 51% of all lawyers did not get "the client's agreement to the advice or plan of action offered," 76.6% failed to get "the client's agreement to the lawyer's understanding of the facts," and 85.4% "did not inquire whether there was anything else the client wished to discuss before ending the interview."[60]

Although experienced lawyers used less legalese and were better at clarifying gaps, for all other items assessed "there were no significant differences" between the new and experienced lawyer groups.[61] Both clients and lawyers were asked to evaluate the interviews immediately after completion. The experienced lawyers "rated their own interview performance significantly higher" than did the new lawyers, but clients did "not differentiate between the groups."[62]

An Australian initiative that bears some resemblance to specialty certification acknowledges the importance of client input concerning service quality. In 2001, the Best Practice Board of the New South Wales Law Society merged with Quality in Law Incorporated to form a national Australian organization named simply QL Inc., which has the goal of encouraging and recognizing "sustainable best practices" in law firm management.[63] Unlike the Specialist Accreditation Program, QL certification recognizes increasing levels of professional excellence from Level I to Level IV, and its criteria specifically mentions "monitoring client satisfaction."[64] However, QL certification does not indicate that any particular level of client satisfaction has been achieved by a firm, only that a system of monitoring client satisfaction is used.[65]

V. Ethical Excellence

Although many, including Deborah Rhode, continue to repeat that integrity and accountability are key ingredients of professionalism,[66] legal specialists are not, so far as we are aware, specifically encouraged to develop nor assessed for this quality in any country. There should be a test to assess honesty and integrity as qualities at least as important as career advancement. Professor Adrian Evans is currently developing one empirical method for the measurement of final-year law students' values which will soon be tested on practitioners as one component of a still-to-be-developed composite measure of ethical values. The first stage of this study has already disclosed both considerable variation in ethical priorities and in motivating values.

In a 2001 survey of 700 law students,[67] respondents were asked to react to a series of challenging moral hypotheticals encountered in legal practice by determining their actual course of action and rating several potential motivating factors (values) for their impact upon their decision. These scenarios were designed to frustrate a standard rule- based response because that tendency is too well established, at least in Australia. Further, acute personal elements were inserted into the text in order to encourage personal rather than so-called "professional"(role) reactions. We have included several scenarios and their results below to illustrate our concern that the efforts to assess lawyers' values is overdue as a part of the testing process for specialists.

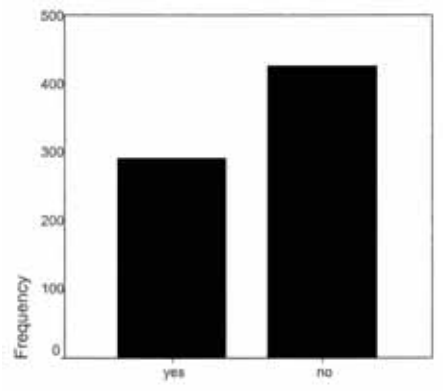
Question: You are a partner in the firm of AMBD. Your nephew (the son of your elder sister) is an associate in the firm. You discover your nephew has a minor gambling problem and has taken money from the firm's trust account to cover his debts. Fortunately, you discover the problem in its very early stages. Your nephew is now undergoing counseling for his gambling addiction and appears to be recovering. The amount missing from the trust account is relatively small, and you are certain could be reimbursed without attracting any attention.

As Graph 1 (page 30) indicates, "a sizeable majority of respondents were prepared to remain silent when aware of a trust account deficiency which involved a blood relative (59.2%)."[69]

Question: While on a summer clerkship with a large and well-respected commercial

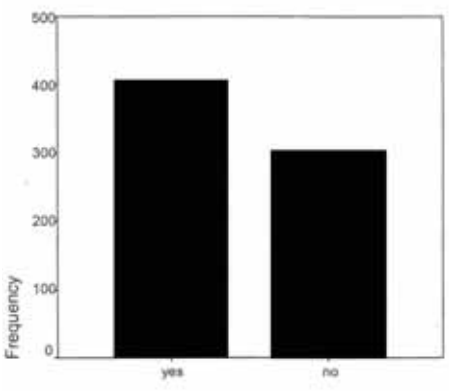
GRAPH 1: Would you report the matter to the local law society?[68]

report nephew



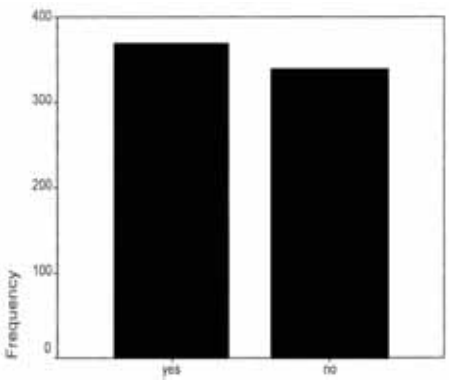
GRAPH 2: Would you round up the hours as requested?[70]

round up hours



GRAPH 3: Would you agree to work on the public interest case?[73]

pro bono work



firm, you are (naturally) concerned to make a good impression. It is your last year of law school and you are desperate for Articles. The partner supervising you decides to give you some of her files to get ready for "costing." She asks you to total the number of hours which she has spent on each file and, from her harried expression, it is pretty clear that she is concerned to charge out a significant amount on each file. She asks you to "round up" her hours to the next hundred in each file, saying that, on average, clients are happy because the main thing they demand is quality work. You know that these clients are entirely satisfied with the firm and that your supervisor is not about to debate the issue with you.

As indicated by Graph 2, "A considerable majority of law students were prepared to round-up hours (not dollars) on a file, to the next 100 hours, for the purposes of billing a client (56.6%)."[71]

A third hypothetical concerned the pro bono duty that should be an essential feature of professionalism.[72]

Question: You are a new solicitor working in a large commercial law firm. A voluntary public-interest organization approaches you to work on a prominent test case about women who kill in self-defense. Your interest in this area is well known. The work would be pro bono and very high profile for you personally but of little interest to your firm. The matter requires a lot of time and work. Your senior partner however wants you to increase your billable hours for the firm. The firm does not usually do any pro bono work but there is no actual policy against it. Your time is currently so limited you could only realistically do one or the other.

As indicated in Graph 3, "Only a small majority of respondents (all still in law school at the time of the survey) considered that they would commit to a public interest pro bono matter (50.8%)."[74]

This troubling lack of commitment is not limited to graduating law students. The importance of pro bono work to professionalism would be underscored and supported if specialist certification programs required evidence of meaningful and consistent pro bono work on the part of applicants as a condition of certification.

Law students' and, we suggest, lawyers' values are not uniform and might be, in reality, no better or worse than those of the general population. If this is true, then what is professionalism? Perhaps it is the decision to behave appropriately, given the right incentives, despite the inclinations we all have to do otherwise. Whether as a measure of values, or inclination to behave in accordance with those values, responses to this sort of hypothetical could play a role in a comprehensive approach to specialist accreditation. As discussed in the next section, empirical research by medical educators indicates that it is possible to use a combination of responses to written questions and observed behavior to assess excellence in service and ethical practice.

VI. Lessons from the Medical Profession

A. Assessing the Quality of Service

The apparent unimportance of measuring client satisfaction in the legal profession makes a striking contrast to the medical profession. According to a 1995 survey, virtually all hospitals in the United States have some kind of patient satisfaction measurement system in place.[75] In 1994, the United States Joint Commission on Accreditation of Healthcare Organizations included in its standards a requirement to ensure that an organization "gathers, assesses, and takes appropriate action on information that relates to the patient's satisfaction with the services provided."[76] A substantial private industry has developed to conduct patient satisfaction surveys for health care providers; some firms have more than 5,000 health care providers as clients.[77] It is increasingly common for doctors to be evaluated by their supervisors based on the results of patient satisfaction surveys.[78]

Doctor-patient communication is treated as an important subject for both pedagogy and empirical research in medical education. One recent review of the literature on doctor-patient communication cited 112 publications.[79] Starting in 2004, a test of communication skills using lay persons, called "standardized patients," trained to simulate realistic clinical presentations, will be a licensing requirement for all new doctors in the United States.[80]

B. Predicting Professional Behavior

Insufficient research has been done to accurately predict actual behavior of lawyers from perceived values, but based on observations in other professions, it is highly probable that the two are connected in some way. As Dr. David Stem described, a system for assessing professionalism is required of all accredited medical residency programs in the United States.[81] The United States Medical Licensing Examination, used nationwide as the standard licensure examination, tests ethics by multiple choice questions,[82] and a growing number of specialty boards are including ethics questions

in their examinations.[83] Like the questions posed in the Australian research described above, the multiple choice ethics questions used in medical examinations often force a choice between competing values rather than just testing knowledge of a rule.[84] A recurrent issue seems to be the duty to report unprofessional behaviors of others, an ethical obligation which is rarely tested in bar examinations and even more rarely honored by lawyers.[85] The medical profession is undertaking serious empirical research to test the reliability of such multiple choice questions as predictors of unethical behavior.[86] Evidence already exists for the reliability of two other assessment methods. One part of the standardized patient test[87] has been shown to have predictive value as to ethical behavior. Standardized patients typically fill out a standard patient satisfaction form as if they had been a real patient for the testing encounter. The examining physician also fills out an assessment form which mirrors the patient's form, in effect asking the examiner to predict how the patient will evaluate the experience.[88] Dr. Stern discovered that medical students who gave themselves higher assessments than did their standardized patients were more likely to appear before an academic review board for professional behavior problems.[89] Thus, even though the standardized patient test was primarily designed to test communicative and diagnostic skills, it also has the potential to identify attitudes and values that may undermine professionalism. For law, this is a particularly relevant finding because simulated client exercises are already well developed in clinical education[90] and, at least in Australia, have already been applied to specialty certification.[91] The addition of the parallel client and interviewer assessment forms would be a simple improvement.[92]

A second assessment method shown to be a reliable measure of professional behavior is based on extensive faculty supervision of actual clinical practice, during and after medical school. (Unfortunately, in the legal profession such close supervision is found only in preadmission legal education and even there, for most law schools, only as an elective for limited credit and short duration.) Specialty board certification necessarily includes such assessment because built into medical residency programs is faculty observation of actual practice.[93] Dr. Stern offers the University of Michigan as an example. Faculty at this institution not only complete summative, longitudinal assessments, but also are encouraged to fill out brief "critical incident reports" on the same day that either exemplary or questionable performance is observed.[94] These reports are particularly valuable because they have the potential of aggregating observations from a number of different faculty members. Dr. Stern reports that his research has shown that when at least eight different supervisors provide evaluations, assessment of professionalism becomes very reliable.[95]

The example of medicine strongly suggests that some kind of supervised practice component, not only as a component of prelicense education but also post-license certification, would be an invaluable way of preventing unprofessional behavior and promoting professional excellence. Perhaps a specialization applicant could substitute such a supervised practice component for some of the mandatory specialization activities required by US programs or to shorten the number of years in specialized practice.[96]

VII. Conclusion

In this essay we have tried to illustrate ways that the term "specialist" could come to signify a more profound kind of professional development than is now formally recognized in either the American or Australian legal profession. The medical profession has shown how a voluntary but rigorous process of post-admission professional development can, over time, produce truly significant specialist proficiency. And such proficiency need not be narrowly defined as technical knowledge and skill. Especially if cross-national and cross-disciplinary approaches are used, ample expertise can be marshaled to design appropriate tests of true professionalism that go beyond the traditional but narrow issues of substantive competence.

One potential benefit of the current approach to specialization by the legal profession in the United States is flexibility. Unlike Australia, where a single state entity controls the criteria and procedures for certification, some American states allow certification by any "recognized and bona fide professional entity."[97] Thus, a state could recognize an organization with a particular interest in or commitment to promoting excellence in client service or ethical practice as qualified to offer an enhanced form of specialization certification without imposing its more demanding criteria and assessment procedures on all specialist applicants in the jurisdiction.[98]

Our reputation as a profession is rarely at risk from challenges to our technical competence, but our doubtful commitment to access to justice and our perceived lack of integrity are very much in the public eye. Other ratings of our professionalism are now required from clients, from the community for our pro bono commitment, and from our peers for our integrity.

We think that professionalism will be advanced immeasurably if bar associations have the political will to use modified specialty certification processes schemes that do not disbar lawyers but, as in Australia, do reward excellence already achieved in order to provide the right balance of protection for the community and adequate personal incentives for lawyers. Such initiatives are in the interests of reputable lawyering, now and well into the future. ■

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Endnotes

1. *See* Judith Kilpatrick, *Specialist Certification for Lawyers; "What Is Going On?*, 51 U. MIAMI L. REV. 273, 306 (1997) (stating that in 1978, ninety-one percent of doctors surveyed ten years after graduation "were either certified or on their way to becoming so").
2. Indeed, professionalism can be thought of as a process in which knowledge develops into wisdom, skill becomes art, and values rise to the level of virtue.
3. For United States requirements, see Kilpatrick, *supra* note I, at 296-97. For Australian requirements, see CHRISTOPHER ROPER, NEW ZEALAND SOCIETY PROPOSAL FOR A SPECIALIZATION SCHEME: REPORT ON THE FEASIBILITY STUDY § 3.4 (2002), available at http://www.nzlawsoc.org.nz/lawtalk/ChrisRoperReport.htm.
4. Kilpatrick, *supra* note I, at 275. This section on the American approach to specialization draws heavily from Professor Kilpatrick's comprehensive article, which is based on her doctoral dissertation in law at Columbia University. *Id*. at 273 n*. Professor Kilpatrick is also a member of the American Bar Association's Standing Committee on Specialization.
5. *Id*. at 277-80.
6. MODEL CODE OF PROF'L RESPONSIBILITY DR2-105 (A)(3) (1969). A narrow exception was made for lawyers admitted to practice before the U.S. Patent and Trademark office. *See* MODEL CODE OF

PROF'L RESPONSIBILITY DR 2-105 (AXI) (1969).

7. Kilpatrick, *supra* note 1, at 282-87.

8. *See In re Peel*, 534 N.E.2d 980,986 (III. 1989).

9. *Peel v. Attorney Disciplinary Comm'n of III.*, 496 U.S. 91, 110 (1990).

10. *Id.* at 109.

11. *See, e.g.*, GA. RULES OF PROF'L CONDUCT R. 7.4 (2000) (stating that a "lawyer who is...certified by a recognized and bona fide professional entity, may communicate such specialty...").

12. MODEL RULES OF PROF'L CONDUCT R. 7.4(c) (2002).

13. Lisa L. Granite, *In No Hurry to Specialize*, THE PENN. LAWYER, May-June 2001, at 24, 24.

14. *Id*.

15. CATRIONA COOKET AL., LAYING DOWN THE LAW 43-44 (2001).

16. *Id*.

17. Chris Merritt, *National Legal Market Closer*, THE AUSTRAUAN FIN. REV., July 26, 2002, at 13.

18. PAUL REDMOND & CHRISTOPHER ROPER, LEGAL EDUCATION AND TRAINING IN HONG KONG: PRELIMINARY REVIEW, CONSULTATION PAPER § 3.1.4, at 36 (2000), available at http://www.hklawsoc.org.hk/pub/news (providing an overview of legal education in Australia and other selected countries for the Steering Committee on the Review of Legal Education and Training in Hong Kong).

19. *Id*.

20. *Id*. § 4.7.1, at 62-63.

21. STANDING COMMITTEE OF ATTORNEYS GENERAL, AUSTRALIA, OFFICER'S REPORT CONCERNING MODEL NATIONAL LAWS GOVERNING AUSTRALIA'S LEGAL PROFESSION 52 n.40 (2002) [hereinafter OFFICER'S REPORT].

22. *See, e.g.*, Legal Practice (Admission Rules) 1999 (Victoria), S.R. No. 144/1999, R.3.01, available at www.dms.dpc.vic.gov.au [hereinafter Admission Rules].

23. *Id.; see also* REDMOND & ROPER, supra note 18, § 3.1.4, at 36-37 (detailing the training process in Australia).

24. Admission Rules, *supra* note 22 at R. 3.02.

25. *Id*. at R. 3.01(1)(a)(i).

26. *Id*. at R. 4.12(2).

27. *Id*.

28. James Bremen, *Articles of clerkship-the end of an era?*, PROCTOR ON-LINE, Apr. 2000, at 18-19, at www.themis.com.aufThemis/BaseSrv/Proctor.nsf; *see also* REDMOND & ROPER, supra note 18, § 3.1.4, at 37 (describing the Articles of Clerk ship system and the moves toward adoption of a common standard).

29. REDMOND & ROPER, *supra* note 18, § 5.3.8, at 56.

30. *See* Law Inst. of Victoria, *Member Services -Professional Development*, at http://www.liv.asn.au/services/services-Professi.html (providing information on specialist accreditation) [hereinafter Law Inst. of Victoria website]. Many of the relevant pages from this site are also available on the web site of the Effective Lawyer Client Communication Project. *See* GA. ST. UNIV. COLL. OF LAW, EFFECTIVE LAWYER CLIENT COMMUNICATION: AN INTERNATIONAL PROJECT TO MOVE FROM RESEARCH TO REFORM, at http://law.gsu.cdu/Communication/ [hereinafter ELCC website].

31. ROPER,supranote3,§3.4.

32. *Id*.

33. *Id*.

34. *See, e.g.*, Law Soc'y of New South Wales, *Accredited Specialists*, at http://www.lawsociety.com.au/page.asp?Partill=670 (providing information on 13 areas of specialization) [hereinafter Law Soc'y of New South Wales website]. Many of the relevant pages from this site are also available on the ELCC website, supra note 30.

35. ROPER, *supra* note 3, § 3.4.

36. Legal Practice Board (Victoria), *2001-2002 Annual Report*, at 21 fig.4, available at www.lpb.vic.gov.au/lpbreport2002.pdf.

37. There is no current specialization scheme in New Zealand, but the New Zealand Law Society has commissioned a feasibility report from the College of Law Alliance in Sydney. *See* ROPER, *supra* note 3.

38. Law Institute of Victoria Specialization Scheme Rules R. 4.4, 4.5, 4.8 (2002), available at Law Inst. of Victoria website, *supra* note 30, and ELCC website, *supra* note 30.

39. Kilpatrick, *supra* note I, at 326 chart I; *see also* RULES REGULATING THE FLORIDA BAR § 6-8.3(2) (requiring a minimum of 25 cases). Other states require a greater variety of completed activities. For example, criminal certification in California requires ten jury trials, 40 criminal or juvenile "matters," and any two of the following three options: five post-conviction hearings, three appeals, or ten additional jury trials. Kilpatrick, *supra* note 1, at 326-27 chart 1. For bankruptcy certification, California requires completion of 30 activities, at least 25 of which must take place in bankruptcy court in no fewer than 15 different cases. *Id.* at 351-55 chart 2. Kilpatrick's information is current as of 1997.

40. ROPER, *supra* note 3, § 3.4.

41. The problem of the "guinea pig" clients would be less worrisome if American certification programs, like medical boards, were built on a well-established system of mentoring so that the completed jury trials represented an ever-increasing amount of responsibility under the guiding hand of an experienced lead attorney. However, legal publications are full of articles decrying the demise of mentoring in the US. *See, e.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34,67-74 (1992) (discussing a middle-ground between education and practice); Sally Evans Winkler et al., Learning to be a Lawyer: Transition into Practice Pilot Project, 6 GA. BARJ., Feb. 2001, at 8, 9 (addressing the need to revive mentoring). For example, for most would-be criminal specialists, the only way to get 25 criminal trials in the first five years of practice is to go to work for a drastically under-resourced public defender or prosecutor's office where learning consists largely of unsupervised on-the-job training of the "sink or swim" variety. There might be better mentoring and supervision in some private firms, but there is usually not enough real case responsibility; associates rarely get much criminal or civil trial experience, particularly not jury trial experience.

42. *See What's New? Specialization News & Events: Study Groups*, Law Inst. of Victoria website, supra note 30; ELCC web site, *supra* note 30. However, the Australian approach to specialist certification for lawyers, in contrast to medical specialization, is still more oriented toward *recognizing* existing specialization than in *creating* specialized expertise. ROPER, *supra* note 3, § 2.3.

43. Inge Lauw, *Specialization, Accreditation and the Legal Profession in Australia and Canada*, MURDOCH UNIV. ELEC. J.L., May 1994, at n.90, at http://www.murdoch.edu.au/elaw/issues/vln2/lauwI2.html.

44. *See Criminal Law Accreditation Assessment Guidelines*, pt.C and *Children's Law Accreditation Assessment Guidelines*, pt. C, at Law Soc'y of New South Wales website, *supra* note 34, and ELCC website, *supra* note 30.

45. *See Personal Injury Law Accreditation Assessment Guidelines*, pt. D, at Law Soc'y of New South Wales website, *supra* note 34, and ELCC website, *supra* note 30.

46. ROPER, *supra* note 3, § 3.4.

47. Family Law was the first specialty to be certified in Australia (in Victoria in 1989). It has the largest number of certified specialists in Victoria (223) and the second largest number in New South Wales (283). ROPER, *supra* note 3, § 3.4.

48. The family law applicant must also prepare a mock file, including client correspondence and court documents, based on a set of documents prepared by the examiners. This is a "take home" project to be completed over a period of two weeks. *See Family Law Accreditation Assessment Guidelines* 31, at Law Soc'y of New South Wales website, *supra* note 34, and ELCC website, *supra* note 30.

49. Livingston Armytage, *Client Satisfaction with Specialists' Services: Lessons for Legal Educators*, in 1 SKILLS DEVELOPMENT FOR TOMORROW'S LAWYERS: NEEDS AND STRATEGIES 355, 356,357,366 n.l(1996) [hereinafter Armytage II].

50. *ld*. at 367 n.2; THE CENTRE FOR LEGAL EDUCATION & LIVINGSTON ARMYT AGE, A REVIEW OF ASPECTS OF THE SPECIALIST ACCREDITATION PROGRAM OF THE LAW SOCIETY OF NEW SOUTH WALES 7 (1996) [hereinafter ARMYT AGE II).

51. ARMYTAGE II, *supra* note 50, at7.

52. Armytage I, *supra* note 49, at 357.

53. *ld*. at 365.

54. *ld*. An interesting indication of the relative unimportance of outcome to client satisfaction is the fact that in the "what I liked" section of the survey there was "little mention of outcomes" and that only one client referred to outcome in the "what I disliked" section. ARMYTAGE II, *supra* note 50, at 118, 122.

55. Armytage I, *supra* note 49, at 366. When quoting from Australian and English materials, we have retained the original spelling (e.g. "recognsze" instead of "recognize.")

56. Avrom Sherr, *The Value of Experience in Legal Competence*, 7 INT'LJ.LEG. PROF. 95, 112 (2000).

57. *Id*. at 118-19.

58. *Id*.

59. *Id*. at 104.

60. *Id*. at 105.

61. *Id*. at 109.

62. Sherr, *supra* note 56, at 107.

63. The College of Law & The Law Society of New South Wales, Best Practice Gateway 3, available at www.collaw.edu.au/cd/cbp/QLBP"/020Framework"/0202002.pdf(last visited Feb. 7, 2003). Training programs to assist firms in meeting QL standards are administered by the College of Law in Sydney. *Id*. at 4.

64. *Id.* at 7.

65. *Id.* at 10. Indeed, a firm could theoretica1ly have QL certification without using a client satisfaction monitoring system. A firm is eligible for Level II certification if it scores at least 350 points on a scale where 500 is a perfect score; having a client satisfaction monitoring system only adds a potential maximum of 10 points towards the total score. *Id*. In contrast, internal firm personnel procedures are worth much more (up to 50 points). *Id*. at

II. LawCover, a wholly owned, non-profit subsidiary of the Law Society of New South Wales, which provides malpractice insurance, offers a risk management course that includes one module on client communication: *Listening. Asking & Explaining. See* LawCover, *Four Principals' Modules*, http://www.lawcover.comAu/risk.asp?indexid=1 4 (last visited Jan. 31, 2003). This unit was developed in response to research comrnissioned by LawCover. *See* RONWYN NORTH & PETER NORTH, MANAGING CLIENT EXPECTATIONS AND PROFESSIONAL RISK (1994).

66. Deborah L. Rhode, *Defining the Challenges of Professionalism: Access to Law and Accountability of Lawyers*, 54 S.C. L. REV. 889 (2003).

67. Results of the 2001 Survey by Adrian Evans, Stephen Parker, and Josephine Palenno were presented to the International Institute of Public Ethics (IIPE) Conference in Brisbane, Australia, on October 4-7, 2002. ADRIAN EVANS & JOSEPHINE PALERMO, LAWYERS' PERCEPTIONS OF THEIR VALUES: AN EMPIRICAL ASSESSMENT OF AUSTRAUAN FINAL-YEAR UNDERGRADUATE LAW STUDENTS-SOME INTERIM RESULTS-2001, available at www.iipe-onIine.org/conference2002/papers/Evans.pdf (last visited Feb. 4, 2003).

68. *Id.* at 7

69. *Id.*

70. *Id.* at 10.

71. *Id.*

72. See MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. 1 (2001) ("Every lawyer...has a [professional] responsibility to provide legal services to those unable to pay. ...").

73. EVANS & PALERMO, supra note 67, at 6.

74. *Id.*

75. *See* WILLIAM J. KROWINSKI & STEVEN R. STEIBER, MEASURING AND MANAGING PATIENT SATISFACTION 25 (2d ed. 1996).

76. *Id.* at 23.

77. *See* Neil Chesanow, *Hire a Pro to Survey Your Patients*, MED. ECON., Oct. 13,1997, at 141, 148,150; *see, e.g.*, Press Ganey Associates, Inc., *About Press Ganey*, available at http://www.pressganey.com/ (last visited Jan. 31, 2003). Press Ganey Associates is one of the leaders in this emerging industry.

78. *See* JEANNE MCGEE ET AL., COLLECTING INFORMATION FROM HEALTH CARE CONSUMERS: A RESOURCE MANUAL OF TESTED QUESTIONNAIRES AND PRACTICAL ADVICE 11:29-11:45 (1997) (describing the Park Nicollet Clinic in Minneapolis, which measures patient satisfaction on an annual basis for all of its first-year physicians). Individual physicians receive the survey results in a report that compares them with other physicians in the same department. The clinic's medical director and each department chair also receive the report which they review with each new first-year physician as part of a comprehensive assessment process. *Id.*

79. *See* L.M.L. Ong et al., *Doctor-Patient Communication: A Review of the Literature*, 40 SOC. SCI&MED. 903 (1995).

80. *Clinical Skills Assessment in the USMLE [U.S. Medical Licensing Examination]*, NBME EXAMINER, Fall/Winter 2002, at 1-3 *available* at http://www.nbme.org/examiner/FallWinter2002/news.htm. The assessment is also available on the ELCC website, *supra* note 30, at Specialization/Medicine.

81. David Stem, Remarks at the Professionalism Conference in Charleston, South Carolina (Sept. 28, 2002), *in Transcript*, 54 S.C. L. REV. 897,945 (2003).

82. Susan Case, Remarks at the Professionalism Conference in Charleston, South Carolina (Sept. 28, 2002), *in Transcript*, 54 S.C. L. REV. 897,939 (2003). Reflecting the progressive nature of professionalism, the exam is given in three parts: (1) after the second year of medical school; (2) during the final, fourth year of medical school; and (3) during the post-graduate residency. *Id.*

83. *Id.*

84. Stem, *supra* note 81, at 946-47 (discussing the importance of testing how people will resolve conflicting values); *see also* Case, *supra* note 82, at 943-45 (presenting sample questions).

85. The Georgia Rules of Professional Conduct have an unusual feature of specifying at the end of each rule the maximum potential punishment for violation of each rule. At the end of the Georgia Rule on "Reporting Professional Misconduct," this sentence appears: "There is no disciplinary penalty for a violation of this Rule." GA. RULES OF PROF'L CONDUCT R. 8.3 (2000), available at http://www2.state.ga.us/courts/bar/stbarru99l.htm. The Georgia rules probably make explicit the actual practice throughout the United States that lawyers are rarely, if ever, disciplined for failure to report the misconduct of other lawyers.

86. Case, *supra* note 82, at 939; Stem, *supra* notes 1, at 946.

87. See *supra* note 75 and accompanying text.

88. Stem, *supra* note 81, at 947.

89. *Id.* at 953. Stem reports that almost no other factor in his wide-ranging data set was able to predict unprofessional behavior. *Id.* The relationship observed by Stem between over-assessing one's own performance in comparison to the patient's assessment and unprofessional conduct by doctors makes Avrom Sherr's findings about English lawyers even more troubling, since in his study it was the experienced lawyers who were more likely to over-assess the quality of their client interviewing. Sherr, *supra* note 56, at 107.

90. *See* Lawrence M. Grosberg, *Medical Education Again Provides a Model for Law Schools: The Standardized Patient Becomes the Standardized Client*, 51 J. LEGAL EDUC. 212 (2001).

91. *See supra* notes 47-48 and accompanying text.

92. The Effective Lawyer-Client Communication Project is in the process of developing model survey forms to be filled out by clients and lawyers at the initial interview that are based, in part, on the procedures developed by the medical profession. *See* ELCC website, *supra* note 30. Professor Cunningham is the director of this project and Professor Evans is a member of the ELCC Advisory Board. The model survey forms are currently being tested in legal services clinics operated by Georgia State University, where Cunningham teaches, and at Monash University, where Evans teaches.

93. *Id.*

94. Stem, *supra* note 81, at 950. These reports are "little cards...the flip side is a concern [or] commendation... Faculty can hand as many in as they'd like." *Id.*

95. *Id.* at 950.

96. In June 2002, a joint report prepared by the committees on Legal Education and Admission to the Bar of the New York State Bar Association and the Association of the Bar of the City of New York was issued recommending a pilot project of up to two years to assess the effects of substituting public service work for the bar exam. Participants in the proposed project would perform supervised work in the court system and then be admitted without taking the bar exam if they passed the Multi State Professional Responsibility Examination, a written performance test designed to assess their ability to apply the law in the context of a lawyer's problem and an evaluation of various skills demonstrated during the course of their service. *See* N.Y. State Bar Assoc., *Summary of the Report on the Public Service Alternative Bar Examination*, available at http://www.nysba.org/Content/NavigationMenu/Attorney- Resources/NYSBA_Reports/List-of- reports.htm (last visited Jan. 30, 2003). A similar proposal for Arizona is being developed by the Community Legal Access Society. This proposal is on file with authors. Both the New York and Arizona reports are also available on the ELCC website, *supra* note 30, at Specialization/BarExam Alternatives. *See also* Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363 (2002) (discussing possible changes to the bar exam); Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM.L.REV. 1696(2002) (questioning the sufficiency of the bar exam as the principal test of admission to the legal profession).

97. GA. RULES OF PROF'L CONDUCT, *supra* note II, at R. 7 .4.

98. Law schools, especially those with strong clinical education programs, could offer enhanced specialist certification. Another possible entity would be the American Inns of Court, whose mission is "to foster excellence in professionalism, ethics, civility, and legal skills," primarily through collegial discussions and mentoring of law students and new lawyers by experienced lawyers and judges. *See* www.innsofcourt.org/contmtviewer.asp?breadcrumb=6,9. However, the American Inns of Court do not currently offer a certification program or registry of qualified lawyers. *See* http://www.innsofcourt.org/contmtviewer.asp?breadcrumb=6,9,343.

An Interview with Our New President—*Robert F. Siler*

Q: What can you tell us about your roots?

Probably more than you want to know, particularly on the paternal side of my family. Jacob Siler, the brother of my great-great grandfather, William Siler, was the first white settler in what is now Macon County. He arrived in 1818 to set up a trading post with the Indians. William moved to the area two years later. Other members of the family also moved to the area within a few years. A lot of other people settled quickly, and by 1828, Macon County was formed out of Haywood County.

On January 1, 1853, Jacob invited his siblings and their families to a dinner at his house. From this first meeting evolved the Siler Family Meeting which has met at least once annually since that time. It is reportedly the longest continuous family reunion in the country. It is always held in Macon County. This past August we had our 153rd consecutive annual Siler Family Meeting.

Q: When and how did you decide to become a lawyer?

After graduating from Duke, I served on active duty in the Navy for four years. I then worked for the Naval Investigative Service for several years and operated a service station in Minnesota for a year. I knew I didn't want to do any of those things for the rest of my life. My wife and my father encouraged me to go to law school. By about the third day of law school, I knew that this was what I wanted to do, and I have certainly not regretted it since.

Q: What is your practice like now and how did it evolve?

When I graduated from Wake Forest Law School, I set up practice in my home town in Franklin. I practiced either as a sole practitioner or with one or two partners until 1991 when I merged my practice with the Coward Firm. The Firm now has eleven lawyers located in three separate small North Carolina towns. My practice consists mainly of real estate and estate administration.

Q: If you had not chosen to pursue a career in law, what do you think you would have done for a living?

I tried other things and was dissatisfied with them. To my chagrin, I could not have become a member of the PGA tour!

Q: How and why did you become involved in State Bar work?

When I was president of the Thirtieth Judicial District Bar, I became active in the formation of the North Carolina Conference of Bar Presidents. Fred Moody was the councilor for the 30th Judicial District at that time and when he was elected vice-president, he encouraged me to run for councilor. I was elected and re-elected and served as councilor for nine years before I was elected vice-president.

Q: What is your experience on the State Bar Council been like?

Extremely rewarding. Serving on the council has been one of the best experiences of my life. I have great admiration for the lawyers who serve on the council, who give their time and energy to regulating the profession. They are ethical, dedicated, and intelligent, and it has been an honor to serve with them. My wife often told me when I returned from a council meeting in Raleigh, that I was rejuvenated.

Q: Do you think lawyers can be trusted to regulate themselves?

Absolutely.

Photo courtesy of Michael Dayton

Q: Prior to becoming an officer, you served as a member and, ultimately as vice chairman of the State Bar's Grievance Committee. What was that like?

The Grievance Committee of the North Carolina State Bar is one of the great deliberative bodies in existence.

The councilors are, almost without exception, extremely well prepared for the meetings, having carefully reviewed all the. materials beforehand, and I can assure you that the materials are considerable. We have often, particularly when there was only one Grievance Committee, consisting of over 30 councilors, had long and somewhat heated discussions over the proper course of action. Often a vote between imposing discipline and not imposing discipline would be extremely close. However, once a decision was made, that matter was put behind the committee and the next matter came on for consideration. The term

As his wife, Theresa, looks on, Robert Siler is sworn in as president of the North Carolina State Bar by Chief Justice I. Beverly Lake Jr.

"without fear or favor" sums up the Grievance Committee decision making process.

Q: In recent weeks the State Bar has received a great deal of criticism of its prosecution of a disciplinary case against two prosecuting attorneys who failed to turn over *Brady* materials in a capital case. Do you think that criticism was justified? Do you believe that there is any reason to suppose that the disciplinary system is defective in some fundamental way? Has it, in your view, been compromised or corrupted? Do I think criticism was justified?

No. Once the defendant in the capital case was granted a new trial, the State Bar, of its own volition, opened a grievance file on the two prosecuting attorneys, Hoke and Graves.

Their case followed the normal disciplinary process. Their cases went before the Grievance Committee. The Grievance Committee found probable cause that they violated ethics rules and referred the matter to the Disciplinary Hearing Commission (DHC). They were tried before the DHC and were found guilty of violating three ethics rules. Discipline was imposed.

The State Bar has received criticism from both sides. One group thought that Hoke and Graves should not be disciplined at all, and another group thought that their discipline was inadequate for their offenses.

I think a lot of the criticism from one segment of the bar was, unfortunately, a reflection of what happens in our society today. Any situation which does not meet one's expectations, or with which one disagrees, seems to engender anger, rather than rational discussion.

I do not believe that the disciplinary system is defective in any way. Some of the decisions of the Grievance Committee and some of the decisions of the DHC may be decisions about which reasonable people can disagree. However, the disagreement should be logical and restrained, aspersions should not be cast on the integrity of the other side. As all lawyers know, there is a lot of gray and not much black or white.

Q: Having participated in review of literally thousands of grievances during your tenure on the Grievance Committee, are you aware of there having been any sort of discrimination against criminal lawyers or in favor of prosecutors?

I am not aware of any discrimination against any group of attorneys, whether they be criminal attorneys, prosecutors, real estate attorneys, or whatever.

Q: In your view is there any reason to suspect that any member of the State Bar's staff is dishonest, lazy, or incompetent?

No. All of the members of the staff, with whom I have had considerable interaction over the years, are dedicated and hard working. I certainly do not think any of them is dishonest, lazy, or incompetent.

Q: Do you have confidence in the integrity of those persons serving as judges on the Disciplinary Hearing Commission?

Yes. The lawyers on the DHC are appointed by the council and are outstanding lawyers with excellent reputations. The lay members are political appointees but are usually appointed after recommendations by the State Bar. These people also are people of excellent reputation.

Q: You have been asked to appoint a special committee of the council to evaluate the State Bar's handling of the Hoke and Graves case and other similar matters. What would you like to see this committee accomplish?

By the time this interview is published, I will have appointed that committee and it will have met. It probably is larger than the optimum size committee but I want a broad spectrum of interest on the committee. I want this committee to review the disciplinary process in relation to revised ethics rules and court decisions and determine if there needs to be any changes or revisions of

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